FILED
JUN 13 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 150

A. M. GILSTRAP, CORA D. GILSTRAP, AND VERA G. WHITE,

vs.

Petitioners,

STANDARD OIL COMPANY, AN OHIO CORPORATION; STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION; J. A. BROWER, W. N. BROWER, E. F. KELLER, EARL WARREN, JOE BRANDON, M. B. DRIVER, GEORGE C. PERKINS, ROBERT P. TRACY, AND DONALD A. PEARCE.

No. 151

A. M. GILSTAP,

vs.

Petitioner,

STANDARD OIL COMPANY, AN OHIO CORPORATION; STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION; J. A. BROWER, ET AL.

PETITION FOR WRIT(S) OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

A. M. GILSTRAP,
CORA D. GILSTRAP,
VERA G. WHITE,
Pro Se.

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STANDARD OIL COMPANY, AN OHIO CORPORATION; STANDARD OIL COMPANY OF CALIFORNIA, A CORPORATION; J. A. BROWER, ET AL.

PETITION FOR WRITS OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition hereby jointly, of A. M. Gilstrap, and Cora D. Gilstrap, his wife, and Vera G. White, each concerned

in Record No. 9158; and, same A. M. Gilstrap in Record No. 9200, each by said records respectfully set forth the following:

Summary Statement of Matter Involved.

The controlling issue involved in the present cases is whether the actions of respondents, as set forth: First, in No. 9158, its "First Amended Complaint" as to all named defendants thereto (No. 9158; R. 3 to 47, incl.) and its "Second Amended Complaint" likewise (No. 9158; R. 135 to 167, with Exhibits annexed each time Verified, R. 180; with no verified Answers thereto) and, No. 9200, its First Amended Complaint (No. 9200; R. 80 to 145, also verified, R. 132-133), or either of such proposed Amended Complaints showing such wilful actions of respondents, constitute restraint of commerce in violation of the Act of 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. (popularly known as the Sherman Act).

Decision(s) in both cases, fully captioned above as separately No. 9158 and No. 9200, in U. S. Circuit Court of Appeals, 9th Circuit, are covered by one opinion of date, January 6th, 1940, rehearing denied March 13th, 1940; said Decision, likewise reported, in:

Gilstrap v. *Standard Oil Co.*, 108 F. (2d) 736.

All petitioners, jointly and severally, in said two captioned cases, repeat here, for above Honorable Court's convenience, the full wording of said joint decision as to both said cases, to-wit:

"Before: WILBUR, GARRECHT and STEPHENS, Circuit Judges.

WILBUR, Circuit Judge:

In these cases the trial court sustained motions to dismiss upon the ground that no substantial Federal

question was presented by the respective complaints. The action of the trial court was correct. *Foster & Kleiser* v. *Special Site Sign Co.*, 85 F. (2d) 742; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, 234; *Levering* v. *Morrin*, 289 U. S. 103.)

The respective judgments are affirmed.

(Endorsed:) Opinion. Filed Jan. 6, 1940, Paul P. O'Brien, Clerk."

I.

That concisely under above clear-cut affirmation of ruling of dismissal of all said petitioners' proposed complaints; First, in No. 9158, its "First Amended Complaint" as to all named defendants thereto (R. 3 to 47, incl.); and its "Second Amended Complaint" likewise (R. 135 to 167), with Exhibits "A" and "B" thereto (R. 168 to 180). Same proposed complaints each time duly verified, the while, no verified answers; and in

No. 9200, its first amended complaint (R. 80 to 145, incl.) having annexed same Exhibits "A" and "B" the said "B" expanded into or takes in Exhibit "B-1";

And, the which, said three (3) proposed complaints, petitioners each jointly and severally do contend the same and each thereof states *a substantial Federal Question.* Holding * * * '*no substantial Federal Question* * * *' would certainly tend to * * * raise such Question, it will be argued by petitioners under most recent rulings of U. S. Supreme Court.

II.

Action No. 9158 (9th Circuit) begun in Federal District Court, Los Angeles, September 18th, 1937, and 'First Amended Complaint' (R. 3 to 47, verified 46) filed February 12, 1938, for treble damages, was denied by His Hon. Judge Yankwich, without leave to amend as to Respondents

* * * 'Warren, Tracy, Brandon, Driver and Perkins' (R. 134, in No. 9158).

And, 'Second Amended Complaint' (No. 9158, R. 135 to 180, Verified) and Filed December 7th, 1938, to which all Motions to dismiss granted by His Honor, February 3, 1939; His Honor, thereunto observing "* * * Not within the jurisdiction of the United States Court, unless it states a cause of action under the Anti-Trust Law." (No. 9158, R. 283.)

This, notwithstanding Plaintiffs' Motion for Default of Standard Oil Company, an Ohio corporation (No. 9158, R. 264-266 & Re; Service on Secy. of State, R. 180-181-182) and Motion of Standard Oil Company, an Ohio corporation, on its Special Appearance having been granted, (No. 9158, R. 282-283); Judgment, R. 286.

In No. 9158 from 1919, the plaintiff A. M. Gilstrap had been exploring and purchasing or leasing some 40,000 acres of petroleum and gas lands in the Capay Valley, in the County of Yolo (R. 138, fol. 127), to extract and ship products in interstate and foreign commerce, and expended more than $80,000 (R. 139, fol. 128). Had there been no interference, he would have drilled at least 30 wells, and produced and shipped from each well 50,000 barrels per day of paraffin-base oil. (R. 141, fol. 129). Plaintiff, daughter, Vera G. White had also $50,000 in the property, and plaintiff Cora D. Gilstrap, his wife, a community interest (R. 153, fol. 138; 163, fol. 145).

There is no dispute of San Martinez Oil Company having acquired all said properties as (ostensible) lessee from said plaintiff (R. 146, fol. 133), or of the admissions by other defendants of possession of government analyses and evidence of mineral deposits and their values, as well as of the cores and samples from said drillings (R. 165, fol. 146). In No. 9158.

That these leaseholds and acreages with investments amounting to $130,000 in addition to additional potential production, and the drilling business, are a total loss to petitioners is not and cannot be, denied. Had the defendants carried out, or had they not prevented, completion of the 30 wells and their production until 1944, the production through samples, analyses, etc., would have been marketed outside this State in great quantities (R. 144, fols. 131-132). And defendants did "in and during the years about 1924 to and including 1937, unlawfully fail, refuse and neglect to complete said or any well upon said lands as so agreed, and did acquire and deprive the plaintiffs of their said lands, leaseholds, petroleum, natural gas and hydrocarbon substances, and all papers, documents, maps, leases, records, reports, analyses, business, values and evidences thereof" (R. 145, fol. 132) said No. 9158. By the same paragraph X (R. 144-145), it is alleged that the defendants so did "for their own benefit, gain and profit, and to monopolize and restrain the plaintiffs and the public from producing, shipping or marketing said products and minerals * * *, and monopolize and restrain all said trade and commerce therein".

Because of all hereof, Petitioners have been damaged in their business which wholly destroyed by all of Respondents' tortious acts, and suffered the damages Prayed for (No. 9158, R. 167) and, likewise in No. 9200, asked for, by and on behalf of A. M. Gilstrap, individually because of all defendants variously joining the abominable scheme somewhere along the line, that damages action for violation of provisions of Anti-Trust Act lies against each defendant herein, to-wit:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the District in which the defendant

resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U. S. C. A. Sec. 15;
Wogan v. *Am. Sugar Ref. Co.* 215 Fed. 273.

"If by necessary operation of the conspiracy, there is an actual restraint the statute is violated, the actual intent being immaterial."
Standard Sanitary Mfg. Co. v. *United States*, 226 U. S. 20, at 49;
Paramount Famous Corp. v. *United States*, 282 U. S. 30, at 49.

* * * "* * * it is sufficient that it is *diverted* or restricted to certain desired channels, which was the purpose of this conspiracy."
Ramsey Co. v. *Associated Billposters*, 260 U. S. 501, 43 S. Ct. 167, 67 L. Ed. 368.

Petitioner's privacy, Fresno, invasion of his home, as recent as "plaintiff is informed and believes, and upon that ground alleges that on or about the month of September, 1937" was invaded (R. 118, No. 9200 by defendants, "* * * each individually, in fortherance of and to thereby carry out the * * *" (R. 118-119) same, "* * * said scheme * * *" (105 No. 9200). Too, all to the great damage of the public and this plaintiff's continuing damage by virtue of all aforesaid defamatory publications (R. 119, end par. XXIV in No. 9200). Also, highly valuable articles and data carried away, by said defendants which plaintiff-appellant describes as near as he may, in Paragraph XXVIII of First Amended Complaint (R. 122-123, No. 9200); and none of defendants venture a single denial by any proper verified pleadings as yet, may we say. The only answers as yet filed, Standard of California (R. 277-287) Not verified;

answer of W. H. Donahue (R. 287-290) (262) Not verified, on the whole, make entire matter Federal Question.

If such, and others acting in unison as further enumerated particularly in Paragraph VI (R. 84-85, in No. 9200) engage exclusively in interstate commerce in petroleum, destroy all right of possession, all petitioners titles to petroleum lands, and the apparatus of another (the Plaintiffs-Petitioners) and prevent them from producing and shipping in commerce great quantities of mineral which are in demand, for many years being from "1930 to and including the year 1937" (R. 84 (79) No. 9200) so that such conspiracy and scheme curtails petitioners potential shipments, *commerce is obviously affected;* but in the course of such exclusive business and object is there no damage by "reason of anything forbidden by the Anti Trust laws"?

In one case it was contended that contracts, licensing, and purely local transactions not actually in transportation, were not actionable under the Anti-Trust laws. But the Supreme Court said: "This contention is not sound."

Standard Oil Co. v. *United States,* 283 U. S. 163.

Too, thereupon we add the whole of Specification of Error, assigned, as being District Court's Error (R. 418, No. 9200):

"I.

That, in view of: 'It is unlawful to issue a blacklist even though not so labelled, where it is calculated to restrict business for the persons so listed' (Federal Antitrust Guide, page 35, citing Eastern States Retail Lumber Dealers Asso. *v.* U. S., 234 U. S. 600) the Honorable District Court, Los Angeles, erred in its order (R. 337-340, No. 9200, of March 13, 1939, in its every detail by which said honorable court held: 'The complaint does NOT state a cause of action under the Anti-Trust Law because none of the allegations here would support such an action' (No. 9200, R. 347) having ref-

erence, of course, to First Amended Complaint, filed January 3rd, 1939, herein (R. 77), notwithstanding, the prior observation: 'There is the statement that the plaintiff enjoyed a good reputation and that, for the purpose of blackening and discrediting and besmirching and libeling him and the members of his family, *the defendants published the various articles*'" (R. 344 in No. 9200).

Eastern States Retail Lumber Dealers Asso. v. *U. S.*, 234 U. S. 600;

Buckeye Powder Co. v. *DuPont, Etc.*, 196 Fed. 514.

It is, too, well said by Hon. Leon R. Yankwich, December 4, 1937:

> "If the observable facts are such as to warrant the belief in the mineral character of lands, whether they were such as would sanction investment, is an inference which may be drawn by the trier of facts from the facts on which the conclusion as to the existence of the belief is grounded."
>
> *United States* v. *Standard Oil Co.*, 21 Fed. Sup. 645, 650.

And, petitioners having not had their day in court, yet continue to suffer further untold damages by delay occasioned by not having full hearing in district court as originally asked and prayed for in said Nos. 9158 and 9200, being asked to be brought up jointly to this Honorable Supreme Court of the United States.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A., Sec. 347 (a)).

2. The date of the judgment of the Circuit Court of Appeals for the Ninth Circuit herein sought to be reviewed is

January 6, 1940 (herein at page 2), and, rehearing by Ninth Circuit denied March 13, 1940.

Gilstrap v. *Standard Oil Co. et al.*, 108 F. (2d) 736.

Questions Presented.

1. Ironically enough, District Court, Los Angeles, presented controlling issue, as to whether Federal question involved, from virtual beginning, February 3, 1939, holding court in Fresno, observing: As to No. 9158:

> "* * * Not within the jurisdiction of the United States Court, unless it states a cause of action under the Anti-Trust Law" (No. 9158, R. 283).

If * * *

> "said *Defendants so gathered* the equivalent of many barrels of said petroleum, and bottled, sealed, encased and recorded all thereof, and a great many cores and reports of the same, for tests, examination and use by dealers and manufacturers in other States and markets, and shipped and transmitted the same and all thereof from Woodland, Los Angeles, and Long Beach in said State, to said State of Ohio and elsewhere, by mail, express, rail and water, in and for the purposes of said commerce and trade, and *likewise did confiscate and monopolize all of* said plaintiffs' samples, cores, and (147) records and ship and transmit the same in and *for the defendants' said marketing, trade and commerce outside said State* of California" (No. 9158, R. 166-167).

Then, is it not a fact that Circuit Court of Appeals for Ninth Circuit may have erred in its Decision(s) as to No. 9158 and No. 9200 (*supra*, 108 F. (2d) 736), therein affirming district court in intimating that in Ninth Circuit Court's opinion there is no substantial Federal question involved: Even where interference with interstate commerce is so de-

liberately intended and directly produced, as by all respondents (defendants below) wilfully acting in unison, per paragraph VI (R. 84-85, in No. 9200 * * * "* * * and did thereby maliciously injure * * *" petitioners herein (R. 85, No. 9200).

2. Did not the Circuit Court of Appeals for the Ninth Circuit err in holding that none of three (two, in No. 9158: R. 3 to 47, and 135-180, verified Dec. 7, 1938; and, one in No. 9200; R. 80 to 145 verified Dec. 31, 1938, at R. 133). Complaints alleged with sufficient definiteness and clearness that petitioners by reason of the primary aim of respondents to monopolize surely lost their all, because of respondents' wilful acts in violation of scope of Sherman Act?

3. Did not said Circuit Court err in holding that virtually the 'World wide' business of the parties hereto, as explained and set forth in said three proposed complaints, is not interstate commerce and that the restraint thereof, complained of by petitioners, is not a violation of the Sherman Act? (End Par. VIII, Tr. 87, No. 9200).

4. Has not the scope of the Sherman Act been "expanded" so as to cover willful intrastate activities, such as set forth in the three (3) complaints, which "directly affect interstate commerce"? The point, too, is directly involved in *Apex Hosiery Co.* v. *Leader*, No. 638, October Term; Certiorari granted February 26, 1940. Likewise, *C. E. Stevens Co., a Corp., et al.* v. *Foster & Kleiser Co.*, No. 41, October Term, 1940; Certiorari granted May 6, 1940.

Reasons Relied On for the Allowance of Writs as to Each, No. 9158 and No. 9200.

1. The decisions affecting both Nos. 9158 and 9200 by Circuit Court of Appeals for the Ninth Circuit in the main that no substantial Federal question presented, is that

effect on interstate commerce of respondents' monopoly and its ruinous effect on petitioners' business was indirect and too remote is in plain conflict with the decisions of this Court, holding such monopoly to be a direct restraint and burden upon interstate commerce.

2. That decision(s) in *Gilstrap v. Standard Oil Co., a Corp., et al.*, 108 F. (2d) 736, by Circuit Court of Appeals for Ninth Circuit, virtually conceding thereby, that main object of conspiracy if to gain control of intrastate aspects of a business, an intent to restrain and obstruct the aspects of a business involving interstate commerce is not such a primary intent as to bring the case within the scope of the Sherman Act is in plain conflict with decisions of this Court holding such an intent to be within the scope of the Sherman Act.

3. The businesses of parties concerned, as explained and set forth in the three (3) proposed Complaints, substantially involve interstate commerce, and (any) conspiracy to restrain or monopolize it is within the scope of the Sherman Act.

4. The instant case(s) No. 9158 and 9200, are within the Sherman Act since the scope of that Act has been extended by the several decisions of this Court which hold that Congressional power over commerce extends to cover not only interstate commerce as such, but intrastate activities which "directly" affect such Commerce.

5. The Circuit Court of Appeals for the Ninth Circuit has decided a question of national importance in conflict with the applicable decisions of this Court.

WHEREFORE, your petitioners, A. M. Gilstrap, and Cora D. Gilstrap, and Vera G. White, each respectfully pray that Writ(s) of Certiorari be issued, as to Nos. 9158 and 9200, out of and under the seal of this Honorable Court,

directed to the Circuit Court for the Ninth Circuit, commanding that court to certify and send to this Court on the date to be designated in said Writ(s), full and complete Transcripts of each record of all proceedings in these cases numbered and titled on its docket

"No. 9158. Term 1939.

A. M. GILSTRAP, and CORA D. GILSTRAP and VERA G. WHITE, *Appellants*,

vs.

STANDARD OIL COMPANY, a Corporation, Standard Oil Company of California, a Corporation, J. A. BROWER, W. N. BROWER, E. F. KELLER, EARL WARREN, JOE BRANDON, M. B. DRIVER, GEORGE C. PERKINS, ROBERT P. TRACY and DONALD A. PEARCE, *Appellees;*

and,

No. 9200

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

A. M. GILSTRAP, *Appellant*,

vs.

STANDARD OIL COMPANY, an Ohio Corporation, and Standard Oil Company of California, a Corporation; SAN MARTINEZ OIL COMPANY, a Corporation; J. A. BROWER, and W. N. BROWER, EARL WARREN, JOE BRANDON, M. B. DRIVER, ROBERT P. TRACY, SAMUEL BERRY, GEORGE C. PERKINS, DONALD A. PEARCE, W. H. DONAHUE, KATIE A. CONNIFF, FRANK M. CARR, L. E. VAN PATTEN, HUGO RADBRUCH, and MARK W. GARBINI; and HEARST PUBLICATIONS, Incorporated, a Corporation; THE CHRONICLE PUBLISHING COMPANY, a Corporation; THE TRIBUNE PUBLISHING CO., a Corporation, *Appellees.*"

to the end that said cases No. 9158 and 9200 may be reviewed and determined by this Court as provided by law

and that your petitioners may have such other and further relief in the premises as to This Honorable Court may seem proper.

Dated Fresno, California, June 8th, 1940.

A. M. GILSTRAP,
In Pro Per.
CORA D. GILSTRAP,
In Pro Per.
VERA G. WHITE,
In Pro Per.

A. M. GILSTRAP and CORA D. GILSTRAP, and Daughter VERA G. WHITE: Address: #118 Peralta Way, Fresno, California.

BRIEF IN SUPPORT OF PETITION FOR WRIT(S) OF CERTIORARI.

Opinions of the Courts Below.

The rulings of the District Court for the Southern District of California, Northern Division, sustaining the respondents Warren, Tracy, Brandon, Driver and Perkins' motion to dismiss filed March 28, 1938, and demurrer to first amended complaint *was without leave to amend as to said five (5) of respondents*, made by said District Court November 12, 1938, and NOT officially reported, but appears herein at end of "Minute Order" (R. 131, at 134, in No. 9158).

Same five (5) respondents, before Circuit Court moved about July 31, 1939, for dismissal of appeal as to them (R. 315) but such dismissal was denied (R. 318).

As to "Second Amended Complaint" District Court rulings (R. 281-283, in No. 9158) not officially reported, but judgments in record, No. 9158 at 286-287-288-289. Judgments each dated February 13, 1939. Judgments for certain respondents but the five (5) above mentioned filed no judgment yet as said in paragraph just above dismissal of appeal as to them not granted, in No. 9158.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, covering both No. 9158 and No. 9200, was filed January 6, 1940, and reported in:

Gilstrap et al. v. *Standard Oil Co. et al.*, 108 F. (2d) 736.

And joint petition for rehearing as to both cases denied herein, on March 13, 1940 (R. 331).

As to No. 9200, four judgments District Court not officially reported appear of March 20th, 1939, in record of No. 9200, at pages 387-388-389-390-391-392-3, with peti-

tioner, A. M. Gilstrap's exception to Standard Oil Co., of Ohio * * * cost bill, on special appearance (R. 393-394);

And March 23, and two March 24, 1939, judgments for certain respondents in record No. 9200 (R. 396-397-398-399) and March 31, 1939, judgments for certain respondents in record at pages 400-401. Certain other defendants-respondents here having again avoided presentation of any proposed judgments with any costs bills. None of said District Court judgments officially reported, but basis therefor by "The Court" (R. 377-387) March 13, 1939, replete with learned observation. His Honor observed:

"The complaint does not state a cause of action under the Anti-Trust Law * * *" (R. 380, in 9200).

About July 31, 1939, for dismissal of appeal as to them (R. 315), but such dismissal was denied (R. 318).

As to "Second Amended Complaint" District Court rulings (R. 281-283, in No. 9158) not officially reported, but judgments in record, No. 9158 at 286-287-288-289. Judgments each dated February 13, 1939. Judgments for certain respondents but the five (5) above mentioned filed no judgment yet as said in paragraph just above dismissal of appeal as to them not granted, in No. 9158.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, covering both No. 9158 and No. 9200, was filed January 6, 1924, and reported in:

Gilstrap et al. v. *Standard Oil Co. et al.*, 108 F. (2d) 736.

And, joint petition for rehearing as to both cases denied herein on March 13, 1940 (R. 448).

As to No. 9200, four judgments District Court not officially reported appear of March 20, 1939, in record of No. 9200, at pages 387-388-389-390-391-392-393, with petitioner, A. M. Gilstrap's exception to Standard Oil Co., of Ohio * * * cost bill, on special appearance (R. 393-394);

And March 23, and two March 24, 1939, judgments for certain respondents in record No. 9200 (R. 396-397-398-399) and March 31, 1939, judgments for certain respondents in record at pages 400-401. Certain other defendants-respondents here having again avoided presentation of any proposed judgments with any costs bills. None of said District Court judgments officially reported, but basis therefor by "The Court" (R. 377-387) March 13, 1939, replete with learned observation, His Honor observed: "The complaint does not state a cause of action under the anti-Trust Law * * *" (R. 380, in No. 9200). Obviously referring to first amended complaint in No. 9200.

III. Likewise, too, too narrow of application are: *Champlin Refining Co.* v. *Corporation Commissioner of Okla.*, 286 U. S. 210, 86 A. L. R. 403; and *Levering & Garrigus Co.* v. *Morrin*, 289 U. S. 103, 77 L. Ed. 1063. The Circuit Court erred in holding either of cases cited in their opinion, in 108 F. (2d) 736, were controlling.

IV. The "World wide" oil business, as factually explained and set forth in the three (3) tendered complaints, substantially do each involve interstate commerce, and the Circuit Court erred in not holding that such is the case. A conspiracy to restrain or monopolize such business directly restrains and monopolizes interstate commerce and is within the scope of the Sherman Act.

V. The Circuit Court erred in not following the decisions of this Court extending the scope of the Sherman Act to cover not only interstate commerce, as such, but intrastate activities, whereby all * * * defendants, all acting in concert, to such end from year about 1924 to September 1937, "did engage thereby in said unlawful plan, agreement and scheme, and *that all of* the defendants did accuse,

charge, without basis therefor, and did state and allege, and did so give out to the world and did print, publish, distribute, and broadcast in said Districts, in all of northern California, and in all of southern California and elsewhere *outside of said State the statements*, stories, words of defamation, figures and charges of and concerning this plaintiff, as herein alleged, for the purposes and by all said defendants' intent to that end * * *'' (End paragraph VIII, R. 87, (f. 81) in No. 9200).

The said publications, about (alleged) fraudulent practices of ''* * * this plaintiff and members of his family * * *'' such publications ''* * * to blacken, discredit, besmirch, and libel this plaintiff and members of his family * * *'' were ''* * * all by said defendants broadcast as aforesaid concerning this plaintiff * * *'' (paragraph XII, R. 91-92-93, ff. 84-86); and, likewise, ''* * * to blacken, discredit, besmirch and libel this plaintiff * * *'' too, to further broadcast,—another defendant acting in concert (paragraph XV, R. 97-98-99-100, ff. 88-91); each such October 25, 1932, publications and articles in said newspapers, as well, as ''That each defendant and said Earl Warren in particular well knew, that Exhibit ''A'' annexed'' to First Amended Complaint (R. 133, *et seq.*), was but an option for and if oil lands proven; and NOT ever any violation by plaintiff of any laws of California. Exhibit ''A'', (R. 133, ff. 115-117) and, Exhibits ''B'' and ''B-1'' (R. 136-145, ff. 117-122), the latter being the THEN Attorney General Opinion, as to probable, if any, violation of Corporate Securities Act; of which there was none, as well known to said Earl Warren and all his then agents. (Paragraph XVI, R. 101, ff. 91-92-93) No. 9200, all of which intrastate activities of all respondents, in both No. 9158 and No. 9200 ''directly'' affected such interstate commerce.

ARGUMENT.

I. The Circuit Court of Appeals erred in holding that no substantial Federal question involved when in fact the main object of the conspiracy as set forth in the three (3) proposed complaints was to and did seek and gain control of intrastate activities, wholly destroyed petitioners' businesses, the intent to accomplish that purpose by restraint upon and actual restraint of interstate commerce through preventing petitioners progress (respondents), fearful of competition on a large scale crippling and most wholly destroying petitioners' business facilities and to destroy their ability to further ever again be able to obtain more or other oil leaseholds involving the interstate shipment of petitioners' many oil products (said circuit court indirectly holding): is not within the scope of the Sherman Act.

How-so-ever, Justice Haney says (*Stevens* v. *Foster & Kleiser Co.*, 109 F. (2d) at 777):

> "The complaint states a cause of action if it *alleged facts showing:*
>
> (1) Jurisdiction in the Court over the subject-matter;
>
> (2) Ownership of a right by Appellants;
>
> (3) Violation of such right(s) by Appellees; and
>
> (4) Damage or injury to appellants resulting from such violation.
>
> United States *v.* McIntire, 9 Cir., 101 F. (2d) 650, 653;
> United States *v.* Humbolt Lovelock Irr. Light & P. Co., 9 Cir., 97 F. (2d) 38, 42."

Petitioners further respectfully submit, that all these elements and too to the full, replete with facts, facts, and

facts, appeared in all tendered complaints in these Nos. 9158 and 9200.

Standard Oil Co. v. *U. S.*, 221 U. S. 1;
Eastern States Retail Lumber Dealers Asso. v. *U. S.*, 234 U. S. 600;
Buckeye Powder Co. v. *DuPont, etc., Co.*, 196 Fed. 514.

A. And, 9th Circuit, perhaps too, having "too narrowly applied the Sherman Anti-Trust Act" in *C. E. Stevens* v. *Foster & Kleiser Co.*, 109 F. (2d) at 769; No. 41, October Term, 1940. Certiorari granted May 6th, 1940.

It is important also to remember that it is not essential that either the petitioners' business which is damaged or the business of the respondents constitute interstate commerce:

> "There is nothing in the Sherman Act confining the right to recover under Section 7 to persons engaged in interstate commerce or whose business or property injured is interstate commerce. If there were any doubt on the subject, it would be instantly laid by the case of Chattanooga Foundry & Pipe Works *v.* Atlanta, 203 U. S. 396. The person injured must be engaged in a business directly, or at least not remotely, affected by the conspiracy complained of."
>
> United Copper Securities Co. *v.* Amalgamated Copper Co., 232 Fed. 574, 577.

> "It matters not that the injury may be due to the conduct of those engaged in intrastate operations."
>
> Schechter *v.* United States, 295 U. S. 495, at 544.

B. The Court must consider pleaded facts as proved, and determine whether upon such assumed facts and the inferences they may reasonably support, a cause of action has been stated. (Heretofore, observed complaints verified, No. 9158 at R. 46, and 180; and, No. 9200, R. 133).

Noshey v. *American Auto Ins. Co.*, 68 F. (2d) 808.

A defendant is not allowed to move a dismissal upon denials of allegations of the plaintiff, or by new matter set up by the defendant. And:

> "A suit should not ordinarily be disposed of on such a motion unless it clearly appears from the allegations of the bill that it must ultimately, upon final hearing, be dismissed."
>
> Thompson *v.* Terminal Shares, 89 F. (2d) 652.

In that case it was said:

> "That rule of procedure should be followed which will be most likely to result in justice between the parties, and, generally speaking, that result is more likely to be attained by leaving the merits of the cause to be disposed of after answer and the submission of proof, than by attempting to deal with the merits on motion to dismiss the bill."

A motion to dismiss must be heard upon and decided according to allegations of the complaint, as upon demurrer; *and defendant is not allowed by filing answer to move dismissal upon denials of allegations of plaintiff, or by new matter set up by defendant.*

Conway v. *White*, 292 Fed. 837 (C. C. A.).

Extraneous Matters Excluded.

The Court should disregard an erroneous ruling in another case, ('as my colleague Judge — said of the' No. 9158, R. 284) which has been appealed from another court.

> "Regardless of Rules: practice, pleadings, and modes of proceeding in civil cases shall conform as near as may be to that of courts of record of the State in which the Federal District Court is held."
>
> 28 U. S. C. A. Sec. 724.

Too, it would appear that the learned Judge District Court Fresno, might have been in error (not yet having

been discovered) * * * when, The Court, February 3rd, 1939, per Reporter's Transcript, No. 9158, R. 283, at 284, observed:

> "* * * although I doubt, in view of the admitted facts, that the wrong related to property *upon which oil had not yet been discovered*—however, (259) under any circumstances, a cause of action could be made under the Anti-Trust Law, * * *"

just below center of said page 284, in No. 9158; and, not vast hunting 'for needle in hay-stack' is necessary, in order to find:

> "And the plaintiffs further allege, that said drilling of said one well, and the records, reports, logs and *analyses did show and the defendants* well knew, that vast and valuable deposits of petroleum, natural gas and other hydrocarbon substances were so encountered * * * and petroleum consisted of the high grade shales, in vast bodies, over lain with sands and thin shales, in thicknesses of over 3000 feet, and that under the structures where the well was drilled the closures of the structures was perfect, and that four pay sands was encountered before the massive sand was encountered, which was at or near 6,000 feet deep, and that the entire massive sands could easily have been drilled into and thereby producing enormous quantities of an excellent paraffine oil, and great quantities of petroleum gases,"

so comprehensively alleged in No. 9158 at Paragraph XII (R. 147-148). Surely, plaintiffs-petitioners, injured, were after all "engaged in a business directly, or at least not remotely, affected by the conspiracy complained of." (Paragraph VI, and IX No. 9158, R. 138-139-140-141 to 144.) (Too, in No. 9200, R. 122-123 Par. XXVIII.)

United Copper Securities Co. v. *Amalgamated Copper Co.*, 232 Fed. 574, 577.

C. Too, it is quite possible or probable Circuit Court erred where District Court first erred.

Therefore, it is respectfully submitted that Circuit Court erred in holding no substantial Federal question involved, the respondents crippling petitioners' business facilities as to destroy their ability to obtain and execute contracts involving the interstate shipment of all oil products mentioned in #1, of Questions Presented (Circuit Court in effect holding:) is not within the scope of the Sherman Act.

II. Foster & Kleiser Co. v. Special Site Sign Co., 85 F. (2d) 742, September, 1936, is not controlling under different facts in instant case; and, Apex Hosiery Co. v. Leader (3 Cir. 90 F. (2d) 155, No. 638, October Term; certiorari granted, February 26, 1940, and C. E. Stevens Co. v. Foster & Kleiser Co., 109 F. (2d) 764, this Court No. 41, October Term, 1940; certiorari granted, May 6, 1940. * * *

A. Thereupon on some record herein and Circuit Court opinion it may appear, the *ultimate purpose or object* was to monopolize and apparently by some sort of means did, monopolize a business in its intrastate aspects, there was an *intent* to bring this about by a restraint upon interstate commerce. And, in each these cases, No. 9158 and No. 9200, the presence of *THIS INTENT WAS THE ELEMENT WHICH BROUGHT THESE* two cases within the scope of the Sherman Act; ever so contemplated by Petitioners when filing said No. 9158 and No. 9200, in District Court, Los Angeles.

B. The Circuit Court in holding, no substantial Federal question involved, has failed to distinguish between ultimate ulterior motive and purpose and respondents' intent to accomplish such purpose by a restraint upon interstate commerce forbidden by aforesaid Section 7 of Sherman Act

now known as 15 U. S. C. A., Sec. 15, herein quoted (at 27).

C. Needless to say, Standard Oil Company stores millions of barrels of oil and by-products at the present time for no other purpose than to use in its exclusive interstate marketing and trade. THESE EFFORTS TO ACCOMPLISH THE MONOPOLY BY RESTRAINING INTERSTATE COMMERCE WERE ENTIRELY SUCCESSFUL AS PLANNED BY THE CONSPIRATORS. Records, throughout No. 9158 and 9200.

No one should be "bewildered," however, as to Standard's complained of conduct, fully alleged as to its objects set forth in complaints herein.

D. Officials' Un-Official Unwarranted Acts Deplored.

Certain defendants, the five whose motion for dismissal was denied, do yet question the jurisdiction of the court in this conspiracy to injure the plaintiffs in person and property in violation of the Anti-Trust Act of 1890, which conspiracy HAD the object, as shown by all aforesaid in this closing—and purpose of restraining trade in interstate commerce, which appellees, Warren, Brandon, Driver, Perkins, and Tracy vastly "chimed in" with; and one Pearce—filing no Brief!

U. S. C. A., Title 15, Sec. 15, Act of 1914, Ch. 323. Sec. 4, 38 St. 731, Mont. Fed. Juris. and Proc. (3d ed.), p. 159, Sec. 202, U. S. Code, p. 352, provides, and includes the italicized provisions following, as to this conspiracy, performance of conspiracy, by two of these defendants-appellees at least, and many of the others actually, as well as all of them collectively:

> *"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to*

the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." (Italics ours.)
15 U. S. C. A., Sec. 15.

"The law gives the person aggrieved by the wrongful act a cause of action against the offending party" (*Id.*, Sec. 384, p. 619), though of course not as a separate cause of action if it be but a step in the general anti-trust violation in carrying out such a conspiracy. But one cause, against all in the conspiracy (50 C. J. 619).

Gonsouland v. *Rosomano*, 176 Fed. 421, 100 C. C. A. 97, apparently a leading case from the Fifth Circuit, states by syllibi:

"*An action for malicious abuse of process, civil or criminal, will lie though the process was lawfully issued on a valid judgment for a just cause and is valid and in form; the gravamen being the malicious abuse of the power conferred by the judgment or writ.*

"*The right of action for abuse of process is applicable to all kinds of abuse in the service of lawful process, not only against the officer, whose duty it is to act lawfully but against all who unite with him or direct him to inflict the injury.*" (Italics ours.)

There it appeared that notwithstanding the pendency of a suit for certain property the defendant brought two actions against the plaintiff, one for possession, and one for rent, and seized the plaintiff's stock and fixtures, obtained a judgment and writ of ejectment, evicted the plaintiff and his family, and seized all furniture, beds, bedding and wearing apparel, and destroyed one of the buildings, acting throughout in bad faith and maliciously. A judgment for the defendant was reversed. At page 486 the court said:

"The grievance for which redress is sought arises in consequence of subsequent acts—the illegal and

malicious abuse of the power conferred by the judgment and writ. The principle is general and has been enforced in a great variety of cases. It is applicable to all kinds of abuses in the service of lawful process. For every such wrong there is a remedy not only against the officer whose duty it is to act lawfully but against all who unite with him or direct him to inflict the injury."

In No. 9158 and No. 9200, the complaints, herein, primarily, are the entire question as to the legal sufficiency of the pleadings, re: right here, as to appellees' Warren, Brandon, Driver, Perkins, and Tracy, as well as then Deputy Corporation Commissioner Pearce, that malice was back of it all, as is alleged and verified; nor in any way contradicted.

Any argument or authority cited, by the appellees, intended to support their defense, immediately shows the following important distinctions to emphasize petitioners contentions; In drilling business, producing quantities of petroleum which are sent out of the State, to market greater quantities, the operator who purchases at a supply company in town a cable, an engine, a bit, and an oil tank, is not buying in interstate commerce, although they were all made in another State. But his product cannot be marketed in the State; and in fact is intended for and handled by a dealer outside the State, engaged exclusively in interstate commerce. It cannot be said that the cessation of operations of a $130,000 plant so engaged would not affect interstate commerce, injuriously. It cannot be said that it is the farmer or lessor in Yolo County who is alone injured if his lease operators of 40,000 acres of land bearing $30,000,000 worth of mineral, is closed down, put in jail to keep him out of business, and his plant wrecked and lands taken over by a monopoly, and all production prevented.

Upon the whole case as alleged, petitioners believe that the judgments and orders denying them the right to main-

tain an action against defendants who do not deny petitioners' losses and damage, nor the alleged causes thereof, were erroneous and that the judgments should be reversed.

III. The Circuit Court erred in holding either of cases cited in their opinion, in 108 F. (2d) 736, were controlling.

A. The Congressional power over commerce is governed by the Constitution, Art. I, Sec. 8. Thus empowered, the Congress passed the Sherman Act, and later the Clayton Act. Acting under the same constitutional power Congress has passed the National Labor Relations Act of July 5, 1935 (49 Stat. 449, 29 U. S. C. A. Par. 151 *et seq.*) the Agricultural Marketing Agreement Act of June 3, 1937 (50 Stat. 246, 7 U. S. C. A. Par. 601, *et seq.*) and the Tobacco Inspection Act of August 23, 1935 (49 Stat. 731, 7 U. S. C. A. Par. 511 to 511q). The *scope of each of these acts* has been passed upon by this Court.

National Labor Relations Board v. *Jones & Laughlin S. Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893;

National Labor Relations Board v. *Fainblatt*, 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014;

Santa Cruz Fruit Pack. Co. v. *National Labor Relations Board*, 303 U. S. 453, 58 S. Ct. 656, 82 L. Ed. 954;

United States v. *Rock Royal Co-Op.*, 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446;

Curran v. *Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441.

In considering the validity and applicability of the several acts in these cases the Supreme Court announced that the acts extended to cover not only interstate commerce, as such, but *intrastate* activities which directly affect such commerce.

B. Too, in conclusion, petitioners insist that as part of (they, insist) the substantial Federal question Standard

Oil Company, an Ohio corporation, per #1, of Questions Presented Page 9, herein) it, from the State of Ohio, engaged in interstate commerce, and Motion to Quash Service of Summons being granted erroneously, their Default (R. 264, in No. 9158) is in order; too in No. 9200 (R. 312-313, 146-147).

IV. The 'World Wide' oil business, as factually explained and set forth in the three (3) tendered complaints, substantially do each involve interstate commerce. * * *

V. The Circuit Court erred in not following the decisions of this Court extending the scope of the Sherman Act to cover not only interstate commerce, as such, but all the intrastate activities of all respondents as well.

A. The local transactions are caught up in the current of interstate commerce or their manipulations is capable of *directly affecting*, and burdening and obstructing the interstate commerce and thus they, the respondents here, become subject by their very wilful conduct to Federal regulations. This view is surely further expressed in the following cases:

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126;
Edwards v. *United States*, 91 F. (2d) 767;
United States v. *Wilshire*, 9 F. Supp. 396, aff. 77 F. (2d) 1022.

C. E. Stevens Co. v. *Foster & Kleiser Co.*, 109 F. (2d) 764; No. 41 this Court; Certiorari granted May 6th, 1940.

Conclusion.

The question whether respondents' restraint and obstruction of interstate commerce as alleged in the three (3) proposed Complaints constitute a violation of the Sherman

Act is one of national importance to business and as well the public interest.

Respectfully submitted,

A. M. GILSTRAP, and
CORA D. GILSTRAP, his Wife; and,
Daughter, VERA GILSTRAP WHITE,
On behalf of Each Member My Family:
By A. M. GILSTRAP,
#118 Peralta Way,
Fresno, Calif.

(8783)

AUG 27 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 150

A. M. GILSTRAP, *et al.*,

Petitioners,

vs.

STANDARD OIL COMPANY, an Ohio corporation, *et al.*,

Respondents.

No. 151

A. M. GILSTRAP,

Petitioner,

vs.

STANDARD OIL COMPANY, an Ohio corporation, *et al.*,

Respondents.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF
(To "Standard of Ohio")

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IN THE

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OCTOBER TERM, 1940

No. 150

A. M. GILSTRAP, *et al.*,

Petitioners,

vs.

STANDARD OIL COMPANY, an Ohio corporation, *et al.*,

Respondents.

No. 151

A. M. GILSTRAP,

Petitioner,

vs.

STANDARD OIL COMPANY, an Ohio corporation, *et al.*,

Respondents.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF
(To "Standard of Ohio")

Opinions Below.

"Standard of Ohio" (for brevity: S. of O., their brief, pp. 2-3) should have agreed that No. 9158, U. S. Circuit Court, Ninth Circuit, is now No. 150 before this

Hon. U. S. Supreme Court; and former No. 9200 is the No. 151 which also covered by Opinion, 108 F. (2d) 736. Howsoever what S. of O. brief would infer, as unreported,—we, the petitioners, believe is in the record [No. 150, R. 283; and No. 151, R. 377] for the attention of this Honorable Court, as to its every detail; per, too, where one very large corporation is obviously trying to evade the main issues:

United States v. Socony Vacuum Oil Co., et al., 60 S. Ct. 811: The which, case (May 6, 1940) where, affirming Wisconsin oil Sherman Anti-Trust convictions, the ruling was . . . *case was properly prosecuted in Winconsin Federal District Court, even though many of the defendants had never been within the state.*

A. That, May It Please the Court, Petitioners Insist Has by S. of O.'s Own Brief, Become Part of Federal Question Now Here for Review.

"B."

Thereto, we also add, the "B" (observation, already thereon, in printed petition on file, Nos. 150-151, pages 26-27) and, because so very important, *on that point,* prefer to restate:

> "B. Too, in conclusion, Petitioners insist that as part of (they, insist) the substantial Federal question Standard Oil Company, an Ohio corporation, per #1, of Questions Presented Page 9, herein, it, from the State of Ohio, engaged in interstate commerce, and Motion to Quash Service of Summons being granted erroneously, their DEFAULT [R. 264, in No. 9158] is in order; too in No. 9200 [R. 312-313, 146-147]."

The No. 9158 being here as No. 150. That No. 9200 being here as No. 151.

And petitioners, in each and both cases, insist S. of O.'s arguments throughout both cases, are frivolous,—when predicated primarily on Assistant Secretary of State, Robert V. Jordan's affidavit [R. 223-224-225] though served by duplicate alias summons and two copies complaints, in hand [R. 180-181, with $5.00 fee paid too, to said Secretary of State, No. 9158] with ample evidence, and statement of "Standard of Ohio" now fully before this High Court, as to their then and present, Ohio address [R. 264-265, Exhibit "C" giving Ohio address, R. 266, the Counter-Affidavit as to "Standard of Ohio" well-known, too to have an Ohio address; R. 266-267-268-269—"J. A. Brower makes no Affidavit herein. . . ." [R. (at) 270]—*then, F. H. Kelly, as Secretary,* [R. 272; 273-274 and 275-276-277] finally same Robert V. Jordan, Assistant Secretary of State, December 29, 1938 mailing back, to R. C. W. Friday, of counsel for petitioners, letter having given Secretary of State Office, the same "Main Office, of Standard Oil Company, a corp. Ohio; F. H. Kelly, its statutory Agent, #1405 East 6th St., Cleveland, Ohio. . . ." [R. 276-277-278-279]. [Same, No. 150, in No. 9158; and, likewise No. 9200, at R. 146-147 being No. 151, there reported properly served with process and $5.00 fee also paid and correct address again correctly stated, R. 147, No. 151.] And Exhibit "X" [R. 321, No. 151] from Secretary of State of Ohio, never disputed, as to "Standard of Ohio" correct address in Ohio.

In fact, May it please this Honorable Court,—"Standard of Ohio" in both, No. 150 [R. 280 and 180-181-182] and No. 151 [R. 147 and 321] correctly served. Thereafter, after 30 days expired after Service of Process upon Secretary of States, or Assistant Secretary . . . *Process is complete* [R. 264-265, in No. 150] and, likewise

under similar Motion for Default, in No. 151 [R. 312-313-314-315-316-317-318-319-320], citing particularly:

> *State, ex rel. Bond & G. T. v. Superior Court,* 169 Wash. 688, 15 Pac. (2d) 660, affirmed in 289 U. S. 361; reported, too, in 89 A. L. R. 653, at about page 657, second column, . . . Secy. of State by law, became its agent, *for purposes of Service of Process* . . .

[Already cited, too, to U. S. District Court in No. 151, at R. 320.]

Process is complete, when made on Secretary of State.

> Paragraph #333, Ballantine on Corporations, page 320.

Wherefore, default of defendant [R. 320, in No. 151] Standard Oil Company, an Ohio corporation, is asked for in both No. 151 and No. 150 [R. 264].

"C."

Hence, it follows, too, that "C", precisely, of and concerning petitioners' "C" in Appellant's Opening Brief, No. 9200, now No. 151 just here is most too to the point:

"Standard of Ohio" Motions: the One, Standard Oil Co., an Ohio Corporation, by Special Appearance, and Particularly Many Affidavits From Ohio, Approaches the Frivolous by the Affiants Being Strangers to the Record.

A motion to dismiss is in legal effect the equivalent of a demurrer, raising only questions of law as distinguished from questions of fact.

> *Noshey v. Am. Auto Ins. Co.,* 68 Fed. (2d) 808 (C. C. A.);
>
> *Thompson v. Terminal Shares,* 89 Fed. (2d) 652.

The "Standard of Ohio" "questions of law," as will be seen, consist entirely of affidavits by strangers to the action, to-wit, Mr. Holliday [R. 207, in No. 151] and others, stating re. the First Amended Complaint though said W. T. Holliday NOT personally a party defendant, nevertheless purports to (deny):

> "Denies that said Standard Oil Company, an Ohio corporation, [187] directly or indirectly, *through agent, or subsidiary, or associate, or representative, at any time whatsoever caused either Standard Oil Company of California or San Martinez Oil Company, or anyone else whether a defendant herein* or not, to do or bring about, or cause to be done, or brought about, any act or thing whatsoever, *whether or not alleged in said First Amended Complaint* herein; . . ." [Tr. p. 214, etc., in No. 151.]

thereby purporting TOO, to have read the First Amended Complaint [which is VERIFIED, R. 132-133] but *appearing specially* "1. To dismiss the action, or in lieu thereof, to quash the return of the Service of Summons . . ." [R. 205, in No. 151]; which Honorable District Court, re: ["I" R. 372, in No. 151] was granted, [R. 375, in No. 151]: "(I) that Motion to Quash Service is granted" [339], having then and there left "Standard of Ohio" forever, after 30 days after service [R. 146-147, in No. 151] open to Default Judgment, as against "Standard of Ohio" fully here now in court, but everyone of their affiants allegedly of record:

Said W. T. Holliday [R. 207, in No. 151];

O. L. Brown, Asst. Treas. [R. 224, in No. 151];

F. H. Kelly, Secretary . . . [R. 241, in No. 151; having read First Amended Complaint [R. at 250 and at 218 and 361, in No. 151];

are, promptly strangers to the record; and Motion for DEFAULTS in both No. 150 and No. 151, already amply discussed.

Los Angeles, etc. Bank v. Northrup, 120 Cal. App. 677, 8 Pac. (2d) 528 (1932);

49 *C. J.* 182 at 209.

In Conclusion.

It would become too repititious to restate same substance here as to No. 150 wherein same officials of "Standard of Ohio" made very, very similar or identical affidavits, as virtual strangers, or,—are they allowing default as against STANDARD OIL COMPANY, an Ohio corporation:

Same, W. T. Holliday [R. 190, in No. 150]:

Same Secretary, F. H. Kelly [R. 210, in No. 150]; etc., etc.

Again, petitioners reiterate Roman No. "V" in Petition for WRIT(s) as to both Nos. 9158 and 9200 on FILE, we respectfully submit, were Air-Mailed to Washington, D. C., within time; and, such No. "V" point (in Petition, page 27):

That, all respondents:

". . . their manipulations . . . capable of *directly affecting,* and burdening and obstructing the

interstate commerce and thus they, *the respondents here, became subject by their wilful conduct to* Federal regulations."

Petitioners, already citing (Petition, p. 27):

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126;

Edwards v. United States, 91 F. (2d) 767;

United States v. Wilshire, 9 F. Supp. 396, aff. 77 F. (2d) 1022;

C. E. Stevens Co. v. Foster & Kleiser Co., 109 F. (2d) 764, No. 41 this Court, Certiorari granted May 6, 1940.

Petitioners add:

United States v. Socony Vacuum Oil Co., 60 S. Ct. 811.

The whole, of all matters discussed by "Standard of Ohio's" brief, herein filed by Messrs. Felix T. Smith, and Norbert Korte and Francis R. Kirkman, amply makes same one substantial Federal Question,—TOO, as to jurisdiction as no diversity of citizenship is material, where violation of Anti-Trust law is the main controversy, petitioners submit as amply pleaded in No. 150 and No. 151, as well as petitioners' motions for "Standard of Ohio" Default, now in order before this Honorable Court. And, too, under DEFAULT(S) if entered in either or both cases, the Complaints sufficiently state a cause of action, so as to

sustain a Judgment in either case, No. 150 or No. 151 or both thereof.

Wherefore, it is respectfully submitted that Petition(s) for Writs of Certiorari should be granted.

Dated, Los Angeles, California, August 22nd, 1940.

N. LINDSAY SOUTH,
Fresno, Calif.,

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Los Angeles, Calif.,
Attorneys for Petitioners.

A. L. WIRIN,
Douglas Building, Los Angeles,
Of Counsel for Petitioners.

APPENDIX.

In the Supreme Court of the United States.
October Term, 1940.

No. 150 and No. 151.

United States of America)
)
State of California,)
)
County of Los Angeles.)

AFFIDAVIT OF SERVICE, OF PRINTED COPIES OF PETITION FOR WRITS OF CERTIORARI HEREIN:

R. C. W. Friday, being first duly sworn, deposes and says: I am and was at the time of the Service of the PRINTED COPIES OF PETITION FOR WRITS OF CERTIORARI herein, over the age of 21 years, and not a party to the within action;

That, promptly upon return of my mother, age —88— home, August 4th, from appendix removal, affiant left Des Moines, Iowa, on August 7th, and promptly upon arrival, San Francisco, did personally serve true COPIES, of PRINTED COPY OF PETITION FOR WRITS OF CERTIORARI herein, as to both No. 150 and No. 151 above named and Captioned Cases, on the hereinafter named Respondents by delivering to and leaving with the Law Offices, each Attorneys of record for certain Respondents, in State of California, at the address of such Law Offices, during business hours and prior to 5:00 p. m. of such dates as mentioned, with persons named entitled to receive such true COPIES of said Petition, as on file herein within time, at U. S. SUPREME COURT, Washington, D. C.

Name of Law Office Served Address Date of Service

PERCY E. TOWNE, DeYoung Bldg., San Francisco, Calif., August 12th, 1940;

GROVE J. FINK, by serving and leaving with his Secretary, Nan McCarroll, Office now: 1018 Hearst Bldg., San Francisco, August 12th, 1940;

JAMES H. OAKLEY, State Building, San Francisco, Calif., August 12th, 1940;

PILLSBURY, MADISON & SUTRO & NORBERT KORTE, by serving personally their Secretary, Jacqueline Myers, at 19th Floor, Standard Oil Building, San Francisco, California, on August 12th, 1940;

MR. BEILENSON, of former firm: VALEE, BEILENSON & KENNY, at Los Angeles, California on August 14th, 1940;

WALTER L. BOWERS, at 903 State Bldg., Los Angeles, August 19th, 1940;

LAWLER, FELIX & HALL & MARCUS MATTSON, by serving their secretary, Clara Erwin, at Standard Oil Bldg., Los Angeles, August 19th, 1940;

MORTIMER KLINE, by serving his secretary, Maxine Hansen, at new Office, SECURITY TITLE BLDG., Los Angeles, August 19th, 1940;

AND, that affiant's business address is P. O. Box—905—Los Angeles, California, that on the 21st day of August, 1940, affiant served true COPIES, likewise, of PETITION FOR WRITS herein, on additional parties to said actions, No. 150 and No. 151, by placing a true COPY, each in separate envelopes addressed to the Attorneys of record for certain parties in said actions No. 150 and No. 151, at their Office addresses of said Attorneys, as follows:—

ROBINSON, PRICE & MACDONALD, 1600 Financial Center Bldg., Oakland, California;

JOHN W. COLLIER, 503 City Hall, Oakland, California; and,

FRANK M. CARR, *in pro. per.*, 1706 Broadway, Oakland, California;

KATIE A. CONNIFF, *in pro. per.*, 68 So. Livermore Ave., Livermore, California;

and by then sealing said envelopes and depositing the same, August 21st, 1940, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of one of counsel for the persons by and for whom said services were made.

That there is delivery service by United States mail at the places so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

R. C. W. FRIDAY.

Subscribed and sworn to before me this 22nd day of August, 1940.

(Notarial Seal) J. B. MANDEL,

Notary Public in and for the County of Los Angeles, State of California.

FILED
SEP 9 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 151.

A. M. GILSTRAP,

Petitioner,

vs.

STANDARD OIL COMPANY (an Ohio corporation), and STANDARD OIL COMPANY OF CALIFORNIA (a corporation), SAN MARTINEZ OIL COMPANY (a corporation), J. A. BROWER, and W. N. BROWER, EARL WARREN, JOE BRANDON, M. B. DRIVER, ROBERT P. TRACY, SAMUEL BERRY, GEORGE C. PERKINS, DONALD A. PEARCE, W. H. DONAHUE, KATIE A. CONNIFF, FRANK M. CARR, L. E. VAN PATTEN, HUGO RADBRUCH, and MARK W. GARBINI, and HEARST PUBLICATIONS, INCORPORATED (a corporation), THE CHRONICLE PUBLISHING COMPANY (a corporation), THE TRIBUNE PUBLISHING COMPANY (a corporation),

Respondents.

Petitioner's Reply Brief to Respondents, Hearst Publications, Incorporated, The Tribune Publishing Company and The Chronicle Publishing Company, Herein, on Granting Writ of Certiorari.

R. C. W. FRIDAY,
P. O. Box 905, Main Office, Los Angeles,
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Douglas Building, Los Angeles,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 151.

A. M. GILSTRAP,

Petitioner,

vs.

STANDARD OIL COMPANY (an Ohio corporation), and STANDARD OIL COMPANY OF CALIFORNIA (a corporation), SAN MARTINEZ OIL COMPANY (a corporation), J. A. BROWER, and W. N. BROWER, EARL WARREN, JOE BRANDON, M. B. DRIVER, ROBERT P. TRACY, SAMUEL BERRY, GEORGE C. PERKINS, DONALD A. PEARCE, W. H. DONAHUE, KATIE A. CONNIFF, FRANK M. CARR, L. E. VAN PATTEN, HUGO RADBRUCH, and MARK W. GARBINI, and HEARST PUBLICATIONS, INCORPORATED (a corporation), THE CHRONICLE PUBLISHING COMPANY (a corporation), THE TRIBUNE PUBLISHING COMPANY (a corporation),

Respondents.

Petitioner's Reply Brief to Respondents, Hearst Publications, Incorporated, The Tribune Publishing Company and The Chronicle Publishing Company, Herein, on Granting Writ of Certiorari.

A. Opinions Below.

So that counsel here for all three respondent newspapers be NOT further "confused" (". . . confuse Case No. 150"; their Brief p. 2) as to decision(s), it, the decision in U. S. CIRCUIT COURT OF APPEALS, 9th Circuit, covers both cases, No. 150 and No. 9200, now here as No.

151,—to which respondents have lastly, and only as to No. 151, obligingly responded,—said reported decision(s) in:

Gilstrap v. Standard Oil Co., et al., 108 Fed. (2d) 736.

B. One Copy Record in Respondents' Hands.

One COPY of record certainly sufficient, and Volumes No. 150 and No. 151 printed separately, amply showing ("with whom") May It Please The Court,—Respondents (3) here, may have, or did join . . . *the same conspiracy* [Whole Record, No. 151]:

> "all defendants in furtherance of said plan *and same scheme aforesaid,* and while this plaintiff so owned, controlled, held and *operated his said business,* these same defendants all so continuing. . . ." [Par. XVIII, No. 151, p. 103; formerly No. 9200, 9th Circuit.]

> "The bill was in triplicate, *one copy* thereof being delivered. . . ." *was sufficient.*

Armour Packing Co. v. U. S., 209 U. S. 56, at 67.

C. Jurisdiction and Venue.

Answering first, respondents, (2), (a), (b) and (c) (Their Brief p. 2):

As TO (A).

Petitioner A. M. Gilstrap (No. 151) shows this Honorable Court that he personally (was) assured that long since,—upon filing Petition for Writ(s), the Hon. Paul P. O'Brien, Clerk U. S. Circuit Court of Appeals, San

Francisco, has forwarded one original certified record (of No. 151) with copies, being Transcript No. 151 here under scrutiny and for High Court's attention. Forty more copies are there, San Francisco, ready to be sent up at this Court's pleasure.

As to (b).

This Honorable Court being in vacation, Clerk advised printing and then serving of and by printed copies Petition, which when printed copies received by A. M. Gilstrap, Fresno, California, were then promptly placed in hands of R. C. W. Friday [Appendix, Petitioners' Reply to "Standard of Ohio"] upon his arrival from Iowa, and were by R. C. W. Friday at once served upon all counsel for respective newspapers, on said August 12, 1940, or thereabouts.

Too, said filing of Petition for Writ(s) Air-Mailed via Special Delivery, too, by A. M. Gilstrap *et al.*, June 11, 1940, and thereby within three months, was within time.

Rogers v. Hill, 289 U. S. 582, at 586;

Act of Feb. 13, 1925, Subsection 8(a), Appendix, Vol. 11, Court Rules, p. 42.

As to (c).

Petitioner, A. M. Gilstrap, resubmits, that whole Printed Petition for Writ, as to No. 151, even as to all respondents meritoriously sets forth ample facts (alleged, of course) and correctly rereferred to sufficiently to merit granting of Writ as to this No. 151, so far as these (3) respondents are concerned, having on dates certain (so amply alleged, as to facts . . .) thereby joined the conspiracy.

D. Answering, Next, Respondents' (1) (a), (b), (c) and (d). (Their Brief, pp. 1 and 2.)

Such purported "POINTS" *are all beside the point:*

> "Petitioner . . . business which wholly *destroyed by all of Respondents' tortious acts,* and suffered the damages Prayed for . . . and *likewise in No. 9200," not confusing,*

already pointed out, that No. 9200 is now here as No. 151, nor should they be confused as to their part therein. (Printed Petition, p. 5.) And, same A. M. Gilstrap, sole petitioner as to said No. 151.

E. As to "Allegations of Amended Complaint," No. 151.

Further, thereby, these respondent newspapers, among *"the defendants did accuse, charge, without basis therefor,* and did state and allege, and did so give out 'to the world' and did print, publish, distribute and broadcast *in said Districts,* in all of Northern California, *and in all of Southern California* and elsewhere outside of said State the statements, stories, words of defamation, figures and charges of and concerning this plaintiff, as herein alleged, for the purposes and by all said defendants' intent to that end . . ." [End paragraph VIII, Tr. p. 87, fol. 81.] in No. 151, no longer confusing, as to their part therein.

The said publications, about (alleged) fraudulent practices of ". . . this plaintiff and members of his fam-

ily . . ." such publications . . . "to blacken, discredit, besmirch, and libel this plaintiff and members of his family . . ." were ". . . all by said defendants broadcast as aforesaid concerning this plaintiff . . ." No. 151 [paragraph XII, Tr. pp. 91-92-93, fols. 84-86]; and, likewise, ". . . to blacken, discredit, besmirch and libel this plaintiff . . ." too, to further broadcast,—another defendant acting in concert [paragraph XV, Tr. pp. 97-98-99-100, fols. 88-91]; each such October 25, 1932, in No. 151, publications and articles in said newspapers, as well, as "That each defendant and said Earl Warren in particular well knew, that Exhibit 'A' annexed" to First Amended Complaint [Tr. p. 133, *et seq.*], was but an option for and if oil lands proven; and NOT ever any violation by plaintiff of any laws of California. Exhibit "A" [at Tr. p. 133, fols. 115-117] and, Exhibits "B" and "B-1" [Tr. pp. 136-145, fols. 117-122], the latter being the THEN *Attorney General Opinion,* as to probable, if any, violation of Corporate Securities Act; of which there was none, as well known to said Earl Warren and all his then agents. [Paragraph XVI, Tr. p. 101, fols. 91-92-93 in No. 151.]

That, all of defendants' conduct was "published with malicious intention . . ." [Tr. p. 102 fols. 92-93, No. 151], and, likewise, was same the facts as to further publications, of and concerning same plaintiff and his family aforesaid; being on subsequent date, October 26, 1932, in bolder type [paragraphs XVIII and XXI, Tr. pp. 104-105-106, fols. 93-94-95; pp. 109-112, fols. 97-

100]; all such flagrant blacklisting of plaintiff "to the world" being made, in spite of plaintiff nor any member of his wholesome family never having ever violated any laws whatsoever, and specifically in light of Exhibits "A", "B" and "B-1" [Tr. p. 133, etc., fols. 116-122], showing there was NO LAW then within scope of our inquiry in existence in State of California which plaintiff might violate, had he wished to do so! (All citations here in No. 151.)

Thereupon, petitioner shows this Honorable Court that each and every defendant in District Court, made therein such defendants, Earl Warren, *et al.* [paragraph VI, Tr. p. 84, fols. 78-79], and all named thereby *maliciously had violated anti-trust laws* of United States [paragraph XVIII, Tr. p. 103, fols. 93-94], whole, First Amended Complaint herein [Tr. pp. 80-145, fols. 75-122], which by whole thereof, involves a dispute or controversy properly within the jurisdiction of this Court. [Paragraph XXI of First Amended Complaint, Tr. p. 109.] And, whole matter is Federal question here for full consideration as such.

Eastern States Retail Lumber Dealers Asso. v. United States, 234 U. S. 600;

No. 151, at 418-429 and 446;

Specification of Error, further set out for this Court, beginning with "ARGUMENT," in Petition for WRIT, pp. 18-27 on File.

F. Not in Wrong District.

And, defendants, respondents here, variously joining the abominable scheme somewhere along the line, that damages action for violation of provisions of Anti-Trust Act lies against each defendant herein, to-wit:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws *may sue therefor in any district court* of the United States *in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy,* and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.'
>
> 15 *U. S. C. A.,* Sec. 15;
>
> *Wogan v. Am. Sugar Ref. Co.,* 215 Fed. 273;
>
> *Printed Petition on File,* pp. 23-24;
>
> *United Copper v. Am. Copper,* 232 Fed. 574, 577.

Too, . . .

> ". . . in that district" . . . sufficiently alleged, . . . "pursuant to the conspiracy."
>
> *United States v. Socony Vacuum Oil Co., et al.,* 60 S. Ct. 811, at 820.

And, . . .

> ". . . and it is well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiracy."
>
> *U. S. v. Socony Vacuum Oil Co.,* 60 S. Ct. 811, at 858.

Citing:

Nash v. U. S., 229 U. S. 373, at 378.

Petitioner, . . . "this plaintiff, A. M. Gilstrap and Austin M. Gilstrap is one and the same person, *now past middle age* and having spent his whole adult life in successful venture and discovery of such aforesaid commercial products, of and from fields, of his selective nature thereby too, venturing wholly for benefit of public in and as well without state of California. Too, to put thereby much of such products, from aforesaid acreages, upon the Markets of United States and elsewhere *but for the malicious conduct of all defendants herein* mentioned" [VII, First Amended Complaint; R. 85-86, No. 151.] (Printed Petition Herein on File, p. 8.)

Eastern States Retail Lumber Dealers Asso. v. U. S., 234 U. S. 600;

Buckeye Powder Co. v. DuPont, etc., 196 Fed. 514.

"It matters not that the injury may be due to the conduct of those engaged in intrastate operations."

Schechter v. United States, 295 U. S. 495, at 544; *Printed Petition*, p. 19.

"The close and intimate effect which brings the subject within reach of Federal Power may be due to *activities in relation to productive industry*, although that industry when separately viewed is local."

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453, 82 L. Ed. 954.

And, as to No. 9200, now here as No. 151, *intent to monopolize* . . . fully accomplished. (Printed Petition, pp. 22-23.) Restraint upon interstate commerce (Printed Petition, p. 22) was thereby there.

G. No Diversity of Citizenship Necessary Here.

It would appear, therefore, that respondents, three (3) newspapers, fully in error, themselves, as to any diversity of citizenship, etc., being any "Point" to their argument.

> "And the amount of interstate or foreign trade is not material."
>
> *U. S. v. Socony Vacuum Oil Co., et al.,* 60 S. Ct. 811, at 845.

Citing:

> *Montague & Co. v. Lowrey,* 193 U. S. 38.

H. No Statute of Limitations Applies Here.

And, as to any Statute of Limitations ever applying same, respondent newspapers are likewise in error:

> "A conspiracy thus contained is in effect renewed during each day of its continuance."
>
> *U. S. v. Socony Vacuum Oil Co. et al.,* 60 S. Ct. 811, at 846.

Citing:

> *U. S. v. Borden Co.,* 308 U. S. 188.

The whole, of whole conspiracy, as alleged, respondents,

> ". . . acting in unison as further enumerated particularly in Paragraph VI [R. 84-85, in No. 9200) . . . being from '1930 to *and including the year 1937* [R. 84 (79) No. 9200] *so that such conspiracy and scheme curtails petitioners'* potential shipments, commerce is obviously affected, . . ." (PETITION FOR WRIT, No. 151, being said No. 9200, referred to as above, at PETITION, Printed copy p. 7.)

Verified, first amended complaint, filed Jan. 3, 1939, but cause first filed Nov. 3, 1938. [R. 45, No. 151.]

I. Complaint, Under Federal Question.

(Petition pp. 22 and 23.)

And, at first hearing March 13, 1939, His Honor at once in District Court, obviously observed, cause of action might be Federal question [R. 380, No. 151]:

> "While it is true that in many instances of anti-Trust cases blacklisting has been the instrument through which the *restraint in trade was achieved and recovery was allowed.* . . ."

His Honor was at once in Court presented with citation,—*Eastern States Retail Lumber Dealers Asso. v. U. S.*, 234 U. S. 600, therein such matter being found to be Federal question, but Court . . . in Los Angeles, thought otherwise! *Thereby, here as to such Federal question.* [R. 418, No. 151.]

J. Whereupon, Petitioner No. 151 Submits First Amended Complaint States a Cause of Action Against All Defendants, and Relies on Each and Every Specification of Error, Set Out in Full in Pages 18-27, Printed Petition on File.

Adverse Order of Court, March 13th, 1939 [Tr. pp. 372-376], and Reporter's Transcript, said Mar. 13, 1939 [Tr. pp. 377-387] thereupon Judgments appealed from, at [Tr. pp. 387-388]: "Except to whole" of Judgment in favor of Standard Oil Co., an Ohio corporation, particularly to: ". . . and evidence having been introduced . . ." [near top [356] p. Tr. 388]. Other Judgments appealed from, also [Tr. pp. 389-393, in No. 151] here should now be reversed likewise 108 F. (2d) 736.

The Supreme Court (1904), speaking by Mr. Justice Holmes, in *Swift v. United States,* 196 U. S. 375, 395, 25 Sup. Ct. 276, 279, 49 L. Ed. 518, at 522, is aptly followed in 196 Fed. 514, at 521 and 522 (in 1912):

> "To require the party injured by the conspiracy denounced by the Anti-Trust Act to set out his cause of Complaint with that degree of nicety and precision in stating times, places, methods, and persons as is required in the ordinary common-law pleading, would be to nullify the beneficent purpose of the statute. If the *pleader sets out with reasonable certainty and definiteness* the causes which resulted to his injury, and *connect the defendant therewith,* and from such allegations the defendant is apprised of the character of the accusation, and it is not apparent that he will be prejudiced in making his defense, a declaration will not be struck out even though it may contain some statements of a general and indefinite character, and shall fail to disclose the exact times and places when some of the alleged steps in furtherance of the conspiracy were carried on, or the names of all persons employed therein."

Buckeye Powder Co. v. Du Pont etc. Co., 196 Fed. 514, at 522;

Monarch Tobacco Works v. Am. Tobacco Co., 165 Fed. 744;

Overland Pub. Co. v. Crocker Co., 193 Cal. 109;

Peck S. S. Line v. N. Y. etc. S. S. Co., 2 Porto Rico F. 109;

Penn. Sugar Ref. Co. v. Am. Ref. Co., 166 Fed. 254;

Thomsen v. Union Castle M. S. S. Co., 166 Fed. 251.

Attacking one's credit, by false statements, is forbidden by Anti-Trust Act; especially by its, such injury to one's business.

Buckeye Powder Co. v. DuPont etc. Co., 196 Fed. 514, at 524-525.

Citing:

Lowe v. Lawler, 208 U. S. 274.

And, by said last two cited cases, just above,—Motions to Strike Declaration; and, herein all Motions of Defendants to Dismiss, all amounting to Demurrers, should have been overruled. And, action alleged for damages lies, under Anti-Trust laws.

Lowe v. Lawler, 208 U. S. 274;

Gen. Inv. Co. v. St. L. B. & M. R. Co., 260 U. S. 261, at 287.

Petitioner respectfully submits that certiorari herein be granted.

Dated Sept. 4th, 1940.

R. C. W. FRIDAY,
Attorney for Petitioner.

A. L. WIRIN,
Of Counsel.

Office - Supreme Court, U. S.
FILED
SEP 20 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1940
No. 151.

A. M. GILSTRAP,

Petitioner,

vs.

STANDARD OIL COMPANY, an Ohio corporation, and STANDARD OIL COMPANY OF CALIFORNIA, a Delaware corporation [R. 81, No. 151], *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF
to "Opposition" by Standard Oil Company of California; and

REPLY BRIEF
to "Brief of Defendants" Earl Warren and Eight Other Respondents Herein.

ON PETITION FOR WRIT(S) OF CERTIORARI.

R. C. W. FRIDAY,
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Attorney for Petitioner.

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Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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B. Whereupon petitioner No. 151 submits first amended complaint states a cause of action against all defendants, and relies on each and every specification of error, set out in full in pages 18-27, printed petition on file 5

C. Friday's zeal [Tr. p. 385 in No. 151] doubtless to blame, for first co-plaintiffs, variously mentioned in original complaint, filed Nov. 3, 1938, but dismissed as to Cora D. Gilstrap and Vera G. White [Tr. p. 196 (169)] no one appealing therefrom 8

D. The statute provides in such a case that anyone injured in his business or property by anything forbidden by the anti-trust laws of the United States shall recover treble damages and reasonable attorneys' fee; ". . . all defendants in furtherance of said plan and scheme, and while the plaintiff so owned, held and operated his said business . . ." [Par. XXI, Tr. p. 109], appellant thereby damaged . . . from "1930 to and including the year 1937 [Tr. p. 84 (79) in No. 151] 8

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PETITIONER'S REPLY BRIEF
to "Opposition" by Standard Oil Company of California; and

REPLY BRIEF
to "Brief of Defendants" Earl Warren and Eight Other Respondents Herein.

ON PETITION FOR WRIT(S) OF CERTIORARI.

Opinion (No. 151) Below.

"Brief of Defendants," being nine (9) individual respondents, to petition for writ(s), herein agree with Standard Oil of California, a Delaware corporation, hereinafter referred to as "Standard of California," that opinion below, reported in 108 Fed. (2d) 736, and [R. 446, No. 151] being same opinion by U. S. Circuit Court

of Appeals, Ninth Circuit, affirming (Los Angeles) District Court, remarks of said District Court, at R. 377-387; but petitioner adds that: Minutes, March 13, 1939, do begin at R. 371-372.

"Standard of California" (a Delaware corporation) [R. 374] had filed an answer [R. 277-287], *but not verified.*

The nine (9) respondents who now appear here, on "Brief of Defendants": Earl Warren *et al.,* general appearance for them, by James H. Oakley, Esq., in that behalf [VII, R. 373] appear here, with F. Bert Fernhoff, and John W. Collier, and Homer W. Buckley, for Robert P. Tracy, who is among the number, being nine respondents. Their brief, dated September 4, 1940, while "Standard of California" brief, dated September 5, 1940.

And, among other respondents, one Donald A. Pearce filed no brief (Printed Petition, pp. 23) as yet.

Preliminary Statement.

"Preliminary Statement" in said "Brief of Defendants" as to this, No. 151, should therefore include remark, at least, that: Minutes begin at, March 13th, 1939, at R. 371; and, at 11:28 o'clock a. m., cause continued to 3 o'clock p. m. [R. 375, No. 151.]

Jurisdictional Statement.

"Standard of California" admits Petition for Writ(s) was filed on ". . . the last day of the three months' period . . .," which, thereby, petitioner insists is within three months!

Statement(s) of the Case, No. 151.

Petitioner, here replying to two (2) briefs, one by "Standard of California", evidently written by them September 5, and other brief, as to No. 151, written on September 4, each in its own way, seem to be divergent, "quite" in their separate views: One brief on most wholly asserting "lack of diversity of citizenship" (9 Respondents Brief, p. 3), almost wholly avoiding the assertion throughout Petitioner's Printed Petition for Writ(s) that each defendant, at some time, joined the conspiracy: *from "1930 to and including the year 1937"* [R. 84] (79) No. 9200, which is No. 151.

(Printed Petition herein, p. 7.)

Cause filed November 3, 1938 (says Standard of California Brief, p. 2), so how could any statute of limitations apply?

The nine respondents again insist on their domiciles being up north, in other than district where cause filed (their Brief, pp. 2-3), but already petitioner A. M. Gilstrap, chief victim (and Cora D. Gilstrap, his wife, and Vera G. White, his daughter, in No. 150), set out sufficient detail, for on Printed Petition for Writ(s) whole point here being whether any Federal question is in No. 151, thereby involved in the controversy. Once, any defendants below . . . may have, or (as it is amply alleged) did, then and there or theretofore join in with any . . . conspiracy, writer this Reply Brief knows of no way "they" may unravel themselves therefrom, except to "Answer" the charges; and, per (Printed Petition, pp. 23, 24, 25, 26, 27) and 15 U. S. C. A., Sec. 15 set out, thereat, Petitioner A. M. Gilstrap, as to No. 151,

again reiterates: "D. Officials' Unofficial Unwarranted Acts Deplored," even as much as though, in the night time, any number of them even join in killing one member of his said family. [R. 125, No. 151.] (Printed Petition, pp. 23, 24, 25, 26, 27.)

And ". . . and one Pearce . . . filing no Brief!" (Printed Petition, p. 23.)

Their whole "Statement of the Case" by nine respondents in their "Brief of Defendants" of September 4th, as to No. 151, falls by its own weight, respondents, each having been joined as defendants, with others ". . . in that district . . ." where some of the activity ". . . *pursuant to the conspiracy;*" ". . . Los Angeles County . . ." [R. 85] and elsewhere.

> *United States v. Socony Vacuum Oil Co. et al.*, 60 S. Ct. 811, at 820.

And the whole point is: *Whether Federal Question?* See, herein, primarily: [Specification of Errors, R. 417-418, etc., No. 151.]

There was *no* hearing on original Complaint, but (*ex parte*) Order obtained, December 8, 1938, by R. C. W. Friday granting to January 3rd, 1939 [R. 411, No. 151] for to file First Amended Complaint,—R. C. W. Friday having *not* written the original Complaint [R. 439] notwithstanding "Standard of California" inference that ". . . after a hearing, supplanted by a first Amended Complaint" (Their Brief, p. 2) which hearing *not* ever had, as inferred.

Therefore, "Complaint" under Federal Question.

ARGUMENT.

A. Complaint, Under Federal Question.

(Petition, pp. 22 and 23.)

And at first hearing, March 13, 1939, His Honor at once in District Court, obviously observed, cause of action might be Federal question [R. 380, No. 151]:

> "While it is true that in many instances of anti-Trust cases blacklisting has been the instrument through which the *restraint in trade was achieved and recovery was allowed.* . . ."

His Honor was at once in Court presented with citation, —*Eastern States Retail Lumber Dealers Ass'n v. U. S.*, 234 U. S. 600, therein such matter being found to be Federal question, but Court . . . in Los Angeles, thought otherwise! *Thereby, here as to such Federal question.* [R. 418, No. 151.]

B. Whereupon Petitioner No. 151 Submits First Amended Complaint States a Cause of Action Against All Defendants, and Relies on Each and Every Specification of Error, Set Out in Full in Pages 18-27, Printed Petition on File.

Adverse Order of Court, March 13th, 1939 [Tr. pp. 372-376], and Reporter's Transcript, said March 13, 1939 [Tr. pp. 377-387], thereupon Judgments appealed from, at [Tr. pp. 387-388]: "Except to whole" of Judgment in favor of Standard Oil Co., an Ohio corporation, particularly to: ". . . and evidence having been introduced . . . " [near top [356] Tr. p. 388]. Other Judgments appealed from, also [Tr. pp. 389-393, in No. 151] here should now be reversed likewise, 108 Fed. (2d) 736.

The Supreme Court (1904), speaking by Mr. Justice Holmes, in *Swift v. United States,* 196 U. S. 375, 395, 25 Sup. Ct. 276, 279, 49 L. Ed. 518, at 522, is aptly followed in 196 Fed. 514, at 521 and 522 (in 1912):

> "To require the party injured by the conspiracy denounced by the Anti-Trust Act to set out his cause of Complaint with that degree of nicety and precision in stating times, places, methods, and persons as is required in the ordinary common-law pleading, would be to nullify the beneficent purpose of the statute. If the *pleader sets out with reasonable certainty and definiteness* the causes which resulted to his injury, and *connect the defendant therewith,* and from such allegations the defendant is apprised of the character of the accusation, and it is not apparent that he will be prejudiced in making his defense, a declaration will not be struck out even though it may contain some statements of a general and indefinite character, and shall fail to disclose the exact times and places when some of the alleged steps in furtherance of the conspiracy were carried on, or the names of all persons employed therein."

Buckeye Powder Co. v. Du Pont etc. Co., 196 Fed. 514, at 522;

Monarch Tobacco Works v. Am. Tobacco Co., 165 Fed. 744;

Overland Pub. Co. v. Crocker Co., 193 Cal. 109;

Peck S. S. Line v. N. Y. etc. S. S. Co, 2 Porto Rico F. 109;

Penn. Sugar Ref. Co. v. Am. Ref. Co., 166 Fed. 254;

Thomsen v. Union Castle M. S. S. Co., 166 Fed. 251.

Attacking one's credit, by false statements, is forbidden by Anti-Trust Act; especially by its such injury to one's business.

Buckeye Powder Co. v. DuPont etc. Co., 196 Fed. 514, at 524-525.

Citing:

Lowe v. Lawler, 208 U. S. 274.

And, by said last two cited cases, just above,—Motions to Strike Declaration; and, herein all Motions of Defendants to Dismiss, all amounting to Demurrers, should have been overruled. And, action alleged for damages lies, under Anti-Trust laws.

Lowe v. Lawler, 208 U. S. 274;

Gen. Inv. Co. v. St. L. B. & M. R. Co., 260 U. S. 261, at 287.

C. Friday's Zeal [Tr. p. 385 in No. 151] Doubtless to Blame, for First Co-Plaintiffs, Variously Mentioned in Original Complaint, Filed Nov. 3, 1938, but Dismissed as to Cora D. Gilstrap and Vera G. White [Tr. p. 196 [169]] No One Appealing Therefrom.

D. The Statute Provides in Such a Case That Anyone Injured in His Business or Property by Anything Forbidden by the Anti-Trust Laws of the United States Shall Recover Treble Damages and Reasonable Attorneys' Fee; ". . . All Defendants in Furtherance of Said Plan and Scheme, and While the Plaintiff so Owned, Held and Operated His Said Business . . ." [Par. XXI, Tr. p. 109], Appellant Thereby Damaged . . . From "1930 to and Including the Year 1937 [Tr. p. 84 [79] in No. 151.]

Throughout First Amended Complaint, Par I [Tr. p. 81] and Par. IV [Tr. p. 83], it is alleged, various Defendants

> *". . . were and now are interested in and engaged in leasing, owning, exploring and drilling mineral-bearing lands, and in the business of producing, refining and selling oil, natural gas and other hydrocarbon substances in, and without the State of California."*

If such, and others acting in unison, as further enumerated, particularly in Paragraph VI [Tr. pp. 84-85] engage exclusively in interstate commerce in petroleum, destroy all right of possession, all titles to petroleum lands, and the apparatus of another (the Plaintiff-Appellant's) and prevent him from producing and shipping in commerce

great quantities of mineral which are in demand, for many years, being from "1930 to and including the year 1937" [Tr. p. 84 [79]] so that such conspiracy and scheme curtails potential shipments, commerce is obviously affected; but in the course of such exclusive business and object is there no danmage by "reason of anything forbidden by the Anti-Trust laws"?

In one case it was contended that contracts, licensing, and purely local transactions not actually in transportation, were not actionable under the Anti-Trust laws. But the Supreme Court said: "This contention is not sound."

Standard Oil Co. v. United States, 283 U. S. 163.

Too, thereunto we add the whole of Specification of Error,

"1.

That, in view of: 'It is unlawful to issue a black-list even though not so labeled, where it is calculated to restrict business for the persons so listed' (Federal Antitrust Guide, page 35, citing Eastern States Retail Lumber Dealer Asso. vs. U. S., 234 U. S. 600); the Hon. District Court, Los Angeles, Erred in its Order [Tr. 337-340] of March 13, 1939, in its every detail by which said Hon. Court held: 'The Complaint does NOT state a cause of action under the Anti-Trust Law because none of the allegations here would support such an action' [Tr. 347], having reference, of course, to First Amended Complaint, filed January 3rd, 1939, herein [Tr. 77—] notwithstanding the prior observation: *'There is the*

statement that the plaintiff enjoyed a good reputation and that, for the purpose of blackening and discrediting and besmirching and libeling him and the members of his family, the defendants published the various articles.'" [Tr. 344, in No. 151.]

Eastern States Retail Lumber Dealers Ass'n v. U. S., 234 U. S. 600.

It is, too, well said by Hon. Leon R. Yankwich, December 4, 1937:

> "If the observable facts are such as to warrant the belief in the mineral character of lands, whether they were such as would sanction investment is an inference which may be drawn by the trier of facts from the facts on which the conclusion as to the existence of the belief is grounded."
>
> *United States v. Standard Oil Co.*, 21 Fed. Sup. 645, 650.

Petitioner respectfully submits that certiorari herein should be granted.

Dated: September 16th, 1940.

R. C. W. FRIDAY,
Attorney for Petitioner.

A. L. WIRIN,
Of Counsel.

FILED
SEP 30 1940
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

October Term, 1940
No. 150.

A. M. GILSTRAP, CORA D. GILSTRAP, and VERA GILSTRAP WHITE,

Petitioners,

vs.

STANDARD OIL COMPANY, an Ohio corporation, and STANDARD OIL COMPANY OF CALIFORNIA, a Delaware corporation [R. 81, No. 151], *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF
to "Opposition" by Standard Oil Company of California; and

REPLY BRIEF
to "Brief of Defendants" Earl Warren and Four Other Respondents Herein.

(Four remaining Respondents herein silent thus far!)

ON PETITION FOR WRIT(S) OF CERTIORARI.

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In the

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A. M. GILSTRAP, CORA D. GILSTRAP, and VERA GILSTRAP WHITE,

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STANDARD OIL COMPANY, an Ohio corporation, and STANDARD OIL COMPANY OF CALIFORNIA, a Delaware corporation [R. 81, No. 151], *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF

to "Opposition" by Standard Oil Company of California; and

REPLY BRIEF

to "Brief of Defendants" Earl Warren and Four Other Respondents Herein.

(Four remaining Respondents herein silent thus far!)

ON PETITION FOR WRIT(S) OF CERTIORARI.

Opinion (No. 150) Below.

"Brief of Defendants," being five (5) individual respondents, to petition for writ(s), herein agree with Standard Oil of California, a Delaware corporation, hereinafter referred to as "Standard of California," that opinion below, reported in 108 Fed. (2d) 736, and [R. 446, No. 151] being same opinion by U. S. Circuit Court of Appeals, Ninth Circuit, affirming (Los Angeles) District Court, remarks of said District Court, at R. 283-6. First hearing, at R. 131, No. 150.

The five (5) respondents who now appear here, on "Brief of Defendants": Earl Warren *et al.*, general appearance for them, by James H. Oakley, Esq., in that behalf appear here, with F. Bert Fernhoff, and John W. Collier, and Homer W. Buckley, for Robert P. Tracy, who is among the number, being five respondents. Four others still remain silent! Their brief, dated September 4, 1940, while "Standard of California" brief, dated September 5, 1940.

And, among other respondents, one Donald A. Pearce filed no brief (Printed Petition, p. 23) as yet. And, ". . . J. A. Brower makes no Affidavit herein . . .", our Reply to "Standard of Ohio," page 3. Others as to citizenship primarily.

Jurisdictional Statement.

"Standard of California" admits Petition for Writ(s) was filed on ". . . the last day of the three months' period . . .," which, thereby, petitioner insists is within three months!

Statement of the Case.

Petitioners, all Three agree with First Paragraph in matter of No. 150, in James H. Oakley's *et al.* Brief of September 4th, just filed herein, except still, *four other Respondents* are silent as to No. 150. And, Petitioner, A. M. Gilstrap has already filed his Sept. 16th Reply Brief in No. 151.

Reply to three (3) Newspapers has also been filed.

"No *Diversity of Citizenship Necessary Here . . .*," see "G", page 9 of Reply to said Newspapers, filed about September 10, 1940.

> "And the amount of interstate or foreign trade *is not material.*"
>
> *U. S. v. Socony Vacuum Oil Co., et al.,* 60 S. Ct. 811, at 845.

Citing:

> *Montague & Co. v. Lowrey,* 193 U. S. 38.

Hence, "spread-eagle" Affidavits, *re* "Official Capacity" of Earl Warren, Joe Brandon, M. B. Driver, George C. Perkins, Robert P. Tracy (their Brief, Sept. 4, pp. 2 and 3) avail them nothing.

The difference in the two Amended Complaints [No. 150, R. 3 and R. 135], and principal reason for including the first amended complaint in this Record (No. 150) arises from the joinder of these individuals in the First Complaint, who had so acted in an individual capacity but who with mental reservations, apparently, who (the five of them, to whom this Brief addressed) *because of being* (then) *incumbents of Public Office saw fit to so "allege"*

by SPEAKING DEMURRERS! And, thereby, the five mentioned Respondents, by their "Brief of Defendants" wish too, to take refuge behind a color of office to justify unlawful acts in carrying out the concert of mind and action that resulted in the destruction of property rights which it is alleged was their sole "objective" with all other named Defendants!

These five (5) respondents, as to No. 150, insist on their domiciles being up north, in other than district where cause filed (their Brief, pp. 2 and 3), but already petitioner A. M. Gilstrap, chief victim (and Cora D. Gilstrap, his wife, and Vera G. White, his daughter, in No. 150), set out sufficient detail, for on Printed Petition for Writ(s) whole point here being *whether any Federal question is in No. 150* and No. 151, thereby involved in the controversy. Once, any defendants below . . . may have, or (as it is amply alleged) did, then and there or theretofore join in with any . . . conspiracy, writer this Reply Brief knows of no way "they" may unravel themselves therefrom, except to "Answer" the charges; and, per (Printed Petition, pp. 23, 24, 25, 26, 27) and 15 U. S. C. A., Sec. 15, set out thereat, Petitioner A. M. Gilstrap, as to No. 151, and all Petitioners, as to No. 150 again and again reiterate: *"D. Officials' Unofficial Unwarranted Acts Deplored,"* even as much as though, in the night time, any number of them even join in killing one member of his said family. [R. 125, No. 151.] (Printed Petition, pp. 23, 24, 25, 26, 27.)

And ". . . and one Pearce . . . filing no Brief!" (Printed Petition, p. 23.)

Their whole "Statement of the Case" by here as to No. 150, 5 respondents, in their "Brief of Defendants" of September 4th, as to No. 150, falls by its own weight,

respondents, each having been joined as defendants, with others ". . . *in that district* . . ." where some of the activity ". . . *pursuant to the conspiracy;*" " . . . Los Angeles County . . ." [R. 85 in No. 151] and elsewhere.

United States v. Socony Vacuum Oil Co. et al., 60 S. Ct. 811, at 820.

And the whole point is: *Whether Federal Question?* See, herein, primarily: [Specification of Errors, R. 417-418, etc., No. 151.] [In No. 150, Par. XVII, R. 157-159.]

Therefore, "Complaints" under Federal Question.

Whether or not *sufficient false and fraudulent* covenants, through which 40,000 acres of lands and leaseholds were unlawfully and by violence and cunning, wrested from the plaintiffs, with *$80,000.00* worth of equipment and structures, to their damage in business and property, and their shipment and monopoly by an Ohio defendant through local agents and subsidiaries, all of *which restrained the plaintiffs and the public from* producing huge quantities of the *most valuable petroleum known*, paraffin, are alleged to involve interstate commerce from a State which could not consume products coveted by those engaged exclusively in interstate commerce, *no argument was advanced below*, which tended to eliminate such operations from things forbidden by the Anti-Trust laws.

In No. 150, Paragraph XVII [Tr. pp. 157-159, fols. 141-142], contains yet further steps in the protracted plan to *restrain said business,* and to prevent a recurrence of plaintiffs' or other *operators' efforts to put said land on production,* and to disclose the falsity of defendants' published reports of nonproductivity contrary to actual discoveries and records of the Government, taken by violence and fraudulent means, as well as to obtain dismissal of said civil action No. 221682, *which dismissal part of conspiracy.*

Said action No. 221682 mentioned in Paragraph XIV of Complaint, and is alleged in Paragraph XVII [No. 150, at R. 157-158] that damages incurred by loss of all said properties to the time of filing the suit in San Francisco, was more than one-third of the whole amount prayed for herein, or the $10,000,000.00 prayed for therein. Thereafter, and during Petitioner, A. M. Gilstrap's imprisonment, its object of dismissal as part of conspiracy was accomplished, by dismissal said No. 221682 without his knowledge or consent.

Petitioners, herein in No. 150, admit said WARREN, said BRANDON, said DRIVER, said PERKINS, said TRACY, and one PEARCE (who files no Brief) each, too, are Respondents in No. 151, *enlarged conspiracy, against same A. M. Gilstrap, and his wholesome Family,* one member of which, FRED, did virtually succumb by virtue, or rather non-virtue, of all misconduct, of Public Officials' grave misconduct in office, which is putting it mildly [R. 125, No. 151], but *enlarged conspiracy continued down to date of filing within No. 150, which filed September 18, 1937* conceded by footnote (3) bottom of page 7 (Standard of Calif. Brief of Sept. 5, 1940, filed in No. 150 herein.)

ARGUMENT.

And, Therefore, No Statute of Limitations Applies.

The other *silent Respondents,* herein in No. 150, seem to be: J. A. Brower, already mentioned (and, too, in No. 151 [R. 123], in *re* $250,000.00 *payment to him, not denied*); and, herein in No. 150, also silent, heretofore mentioned, Donald A. Pearce; also, E. F. Keller; and, W. N. Brower, Brother of J. A. Brower, the two Browers *being residents in this district, Los Angeles County, State of California, and not denied!* [Par. XII, No. 150, R. 147-149.]

Petitioners' Printed Petition, already sufficiently shows up,—that phase, of the Topic: That, aim and intent, was carried out, *by all the Conspirators.* (Printed Petition, pp. 22 and 23.)

Topic: *"D. Officials' Un-Official Unwarranted Acts Deplored,"* already "quite" briefed, in Printed Petition, pp. 23, 24, 25, 26:

> "For a conspiracy is a partnership in crime; and an 'overt act of one partner *may be the act of all* without any new agreement specifically directed to that act.' "
>
> *U. S. v. Socony Vacuum Oil Co., et al.,* 60 S. Ct. 811, 858.

Too, there's one cause, against all in the conspiracy.

50 *C. J.* 619.

"A conspiracy thus continued is in effect renewed during each day of its continuance."

U. S. v. Socony Vacuum Oil Co., et al., 60 S. Ct. 811, at 846.

Citing:

U. S. v. Borden Co., 308 U. S. 188.

"And the amount of interstate or foreign trade is not material."

U. S. v. Socony Vacuum Oil Co., et al., 60 S. Ct. 811, at 845.

Citing:

Montague & Co. v. Lowrey, 193 U. S. 38.

AND, THEREFORE, NO DIVERSITY OF CITIZENSHIP NECESSARY WHEN, 'Tis Federal Question, herein [No. 150, and whole Record, in No. 150] bears on Anti-Trust Law: #15 U. S. C. A., Sec. 15; Printed Petition, pp. 23 and 24.

"It matters not that the injury may be due to the conduct of those engaged in intrastate operations."

Schechter v. United States, 295 U. S. 495, at 544; *Printed Petition,* p. 19.

"The close and intimate effect which brings the subject within reach of Federal Power may be due to *activities in relation to productive industry,* although that industry when separately viewed as local."

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453, 82 L. Ed. 954.

The Supreme Court (1904), speaking by Mr. Justice Holmes, in *Swift v. United States*, 196 U. S. 375, 395, 25 Sup. Ct. 276, 279, 49 L. Ed. 518, at 522, is aptly followed in 196 Fed. 514, at 521 and 522 (in 1912):

> "To require the party injured by the conspiracy denounced by the Anti-Trust Act to set out his cause of Complaint with that degree of nicety and precision in stating times, places, methods, and persons as is required in the ordinary common-law pleading, would be to nullify the beneficent purpose of the statute. If the *pleader sets out with reasonable certainty and definiteness* the causes which resulted to his injury, and *connect the defendant therewith*, and from such allegations the defendant is apprised of the character of the accusation, and it is not apparent that he will be prejudiced in making his defense, a declaration will not be struck out even though it may contain some statements of a general and indefinite character, and shall fail to disclose the exact times and places when some of the alleged steps in furtherance of the conspiracy were carried on, or the names of all persons employed therein."

Buckeye Powder Co. v. Du Pont etc. Co., 196 Fed. 514, at 522;

Monarch Tobacco Works v. Am. Tobacco Co., 165 Fed. 744;

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Peck S. S. Line v. N. Y. etc. S. S. Co., 2 Porto Rico F. 109;

Penn. Sugar Ref. Co. v. Am. Ref. Co., 166 Fed. 254;

Thomsen v. Union Castle M. S. S. Co., 166 Fed. 251.

AND, HENCE, THE WHOLE MATTER, in No. 150, Too, IS IN PETITIONERS' VIEW, *A Federal Question.*

In Conclusion; Certiorari Should Issue:

Petitioners, *in re* No. 150, resubmit, in entire light of Printed Petition herein on file, as well all Petitioners' Reply Briefs to date on file, That WRIT(S) OF CERTIORARI, also as to No. 150, should issue.

C. E. Stevens Co. v. Foster & Kleiser Co., 109 Fed. (2d) 764; No. 41 This Honorable Court; Certiorari granted May 6th, 1940;

Printed Petition, pp. 26 and 27.

Dated: Los Angeles, California, September 24th, 1940.

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Office - Supreme Court, U. S.
FILED
NOV 6 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

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OCTOBER TERM, 1940.

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vs.

STANDARD OIL COMPANY, an Ohio corporation, *et al.*,

Respondents.

No. 151.

A. M. GILSTRAP,

Petitioner,

vs.

STANDARD OIL COMPANY, an Ohio corporation, *et al.*,

Respondents.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONERS' PETITION FOR REHEARING.

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On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONERS' PETITION FOR REHEARING.

A. Original Petition, in No. 150 and No. 151, October Term, 1940, Denied, October Fourteenth.

A. M. Gilstrap, petitioner, 118 Peralta Way, Fresno, California, for himself, wife and daughter, prays rehearing be allowed on so important cases as No. 9158, which is No. 150 here; and No. 9200, which is No. 151.

R. C. W. Friday, of counsel for petitioners, P. O. Box 905, Main Office, New Federal Building, Los Angeles, whose all credentials for his admission before U. S. Supreme Court are now on file with its clerk, in proper form, as R. C. W. Friday is advised, thereupon prays hereby too to be heard, most earnestly, upon each of within No. 150 and No. 151.

Or, in unavoidable circumstances as nearly happened last June,—if my counsel, R. C. W. Friday, not able to argue case, then A. M. Gilstrap, *in pro persona,* will.

B. Preliminary.

In other words, Raymond Lisenba will get a hearing. Then, why not wholesome family of A. M. Gilstrap, *et al.?* (No. 150 and No. 151, R. 124-125 not quaint lack of "due process of law".)

Briefly, it offends most any clean cut citizen, *too,* to not be heard, when guarantee had by Constitution for jury trial when more than $20.00 is involved; but *not* had in fact.

Too, in Gilstrap's family, residing 118 Peralta Way, Fresno, Calif., *in pro persona* (in case attorney perchance, owing to illness of parents in Iowa, detained from possible or probable hearing, henceforth), said petitioners who *not* even apprised by U. S. mail as to what decision was October 14th.

None of respondents, to any complaints in No. 150 and No. 151, have ever denied under oath the *facts* alleged in said complaints, each bearing heavy-laden with fruition by them, in favor of themselves gaining mightily in their violations of anti-trust laws; most amply pointed out by

each of petitioners' reply briefs on file herein, and for reference thereto, pointed to as:

Petitioners' Roman I: Sept. 4th, reply brief:

Under "H" thereof, page 9, the quotation should read:

"A conspiracy thus *continued* is in effect renewed during each day of its continuance."

U. S. v. Socony Vacuum Oil Co., et al., 60 Sup. Ct. 811, 846.

Each page of said No. I, Sept. 4th, 1940, reply brief, herein fully again reasserted, on petition for rehearing.

Petitioners' reply brief to "Standard of Ohio" of date, August 22nd, 1940, for convenience designated: Roman No. II,—and, *correction,* bottom page 3, second to last line, should read: "* * * upon secretary of state," and *not* "state*s*"; and, extra copies as to Appendix thereto, failed to have asserted services, as to page 11, Frank Carr, and Katie Conniff, crossed out, in that *bulk,* the extra 40 copies, by printer—on their way to Washington.

Our apologies for these slight errors.

Likewise, may it please the Court, we fully reassert all of reply brief, of September 16th, 1940, which we may know as Roman No. III, hereinafter.

Too, reply brief of September 24th, as Roman No. IV.

The laws of these great United States were made to be obeyed; and no provision therein which may be considered as mitigational conditions which permits any courts of the United States to wink at one person or persons and pass them up as excusable and yet on other hand prose-

cute others who are less wealthy; nor have we here anything by which petitioner's being even permitted to be heard would or might interfere with defense program.

The Congress hath declared for every official to undertake with affirmation to that end, that will administer laws equally among the poor and the rich alike, and violations of oath is not permissible even for the comfort and ease of any Standard Oil Company, of which there are legion. Nor for an attorney general who may have all the facts.

U. S. v. Socony Vacuum Oil Co., et al., 60 Sup. Ct. 811.

A court is a body of men appointed or elected to serve the people alike without regard to politics; Congress made the courts, meaning district courts, by virtue of the Constitution and the Bill of Rights, nor do laws applying thereto provide the right (argumentatively) to make fish of one and flesh of another, and any person may carry a wrong to such courts and have his or her day in that court. Gilstraps yet claim and will show, that at no time have they, or either of them, *had their day in court, on the whole* question of the federal question in these two causes, No. 150 and No. 151, involving wider field than merely arbitrary State of California boundary lines.

Wherefore, abounding facts of course alleged and not denied (No. 150, R. 3 to 46; first amended complaint, verified Feb. 12, 1938) are concise enough, under federal question, to require trial by jury of highly notable misconduct of J. A. Brower (No. 150, R. 38-39), who is

alleged to have received $250,000.00 and *not* denied; nor Earl Warren's, *et al.,* not denied (No. 150, R. 30); and first amended complaint in No. 151, at R. 80-133, duly verified December 31, 1938. The whole misconduct of all respondents, so amply pointed out in printed petition on file, pp. 23, 24, 25, 26, and 27, under caption: *"D. Officials' Unofficial Unwarranted Acts Deplored."*

Reply brief, Roman No. III, page 4.

And one Pearce filed no brief. Printed petition, p. 23. All had joined somewhere along the line: "In that district" . . . "pursuant to the conspiracy" . . . ". . . Los Angeles County . . ." (No. 151, R. 85) and elsewhere.

U. S. v. Socony Vacuum Oil Co., et al., 60 Sup. Ct. 811, at p. 820.

And, may it please the Court, how ever prove our cases, when not allowed ever to enjoy "due process of law" by *not* being allowed petitioners' day in court.

Raymond Lisenba is being allowed his day in court.

Harry Bridges is being allowed his day in court.

American Medical Association, too, to have its day in court.

A. M. Gilstrap alone in one case, paying $444.50 for transcript, besides filing fees, and additional costs, in order to be wholesomely here, with printed petition and printed reply briefs, in wholesome fashion in order to have one clear cut wholesome hearing hereon, and prays that counsel or he himself may be heard as to whole details, involv-

ing a business and damage thereto which more than statewide in merely the State of California, because Court should take judicial notice of wide activity of at least two respondent corporations, worth millions upon millions, who or which have damaged petitioners in their wide field of activity and business undertaken as free American enterprise, by such Native Son, as it were when Raymond Lisenba and Harry Bridges to the contrary notwithstanding.

Argument.

Article the Fourth and Article the Sixth of the Bill of Rights are as binding now as at any time in the past history of these great United States of America. One may not condone with one breath and condemn in and by the next breath the Constitution and statutes of these United States and as absolutely not binding on corporations of great wealth as well as individuals, and one may not so profit by his or *its* wrong-doings. *Its*, the Standard Oil's.

Finally, full and fair rehearing herein *too* to grant that whole matters, in both cases, No. 150 and No. 151, may be heard, will become and make remedial the whole of all matters concerned, not reached by any state court, because of magnitude of Standard Oil's vast field of operations,—not always in the public's interest (par. XXXVIII, No. 151, R. 122-123). J. A. Brower, *et al.*, again, in con-

spiracy with respondents named (No. 150, R. 147). Thereby, *here as to such federal questions* (R. 418, No. 151).

Eastern States Retail Lumber Dealers Asso. v. U. S., 234 U. S. 600;

U. S. v. Socony Vacuum Oil Co., et al., 60 Sup. Ct. 811;

Complaints sufficient as to federal question:

Buckeye Powder Co. v. DuPont, etc., Co., 196 Fed. 514, at 524-25;

Swift v. United States, 196 U. S. 375, at 395;

Monarch Tobacco Works v. Am. Tobacco Co., 165 Fed. 744;

Overland Publishing Co. v. Crocker Co., 193 Cal. 109;

Lowe v. Lawler, 208 U. S. 274;

Stevens v. Foster & Kleiser, No. 41, this Court, 109 Fed. (2d) 764, *certiorari granted May 6th, 1940.*

"The close and intimate effect which brings the *subject within reach of federal power* may be due to *activities in relation to productive industry*, although that industry when separately viewed is local."

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453.

Intent to monopolize was there, and accomplished; would any dare say that such was *not* the case.

Printed petition, pp. 22-23.

A re-review of every page of every one of our reply briefs, I, II, III, and IV, together with above observations wholly justified, and rehearing, with petition granted, should be obvious in so momentous a problem as herein involved. And, too, to do so will not involve the national defense.

Dated: Los Angeles, November 4, 1940.

Respectfully submitted,

R. C. W. FRIDAY,
Los Angeles, Calif.,
Attorney for Petitioners.

A. M. GILSTRAP,
118 Peralta Way,
Fresno, Calif.,
In Pro Persona.

Certificate of Counsel.

I, R. C. W. Friday, attorney for the petitioner in the above entitled cases, certify that this Petition for Rehearing is interposed in good faith and not for the purpose of delay.

R. C. W. FRIDAY.

(16)

In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
SEP 4 1940
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1940

No. 151

A. M. GILSTRAP,
Petitioner,

vs.

STANDARD OIL COMPANY (an Ohio corporation), and STANDARD OIL COMPANY OF CALIFORNIA (a corporation), SAN MARTINEZ OIL COMPANY (a corporation), J. A. BROWER, and W. N. BROWER, EARL WARREN, JOE BRANDON, M. B. DRIVER, ROBERT P. TRACY, SAMUEL BERRY, GEORGE C. PERKINS, DONALD A. PEARCE, W. H. DONAHUE, KATIE A. CONNIFF, FRANK M. CARR, L. E. VAN PATTEN, HUGO RADBRUCH, and MARK W. GARBINI, and HEARST PUBLICATIONS, INCORPORATED (a corporation), THE CHRONICLE PUBLISHING COMPANY (a corporation), THE TRIBUNE PUBLISHING COMPANY (a corporation),
Respondents.

BRIEF FOR RESPONDENTS, HEARST PUBLICATIONS, INCORPORATED, THE TRIBUNE PUBLISHING COMPANY AND THE CHRONICLE PUBLISHING COMPANY, OPPOSING GRANTING WRIT OF CERTIORARI.

GROVE J. FINK,
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ROBINSON, PRICE & MACDONALD,
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The Chronicle Publishing Company.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 151

A. M. GILSTRAP,
Petitioner,

vs.

STANDARD OIL COMPANY, et al.,
Respondents.

BRIEF OPPOSING GRANTING WRIT OF CERTIORARI.

Respondents, Hearst Publications, Incorporated, The Tribune Publishing Company and The Chronicle Publishing Company, respectfully oppose granting a Writ of Certiorari in this case on the following grounds:

1. a. That the District Court had no jurisdiction because of absence of allegations showing diversity of citizenship;

b. That the complaint states no cause of action under the anti-trust law or otherwise;

c. That the publications pleaded are not libelous per se and cannot be made libelous by innuendo as attempted by Petitioner;

d. That the action against these Respondents is barred by the Statute of Limitations.

2. a. The Petitioner has failed to file with his Petition filed herein June 13, 1940, any transcript of the record, as required by subdivision 1 of Rule 38 of this Court;

b. No notice of the filing of the Petition, nor any copy of the Petition nor of the printed record nor of the supporting brief was served on counsel for these Respondents within ten days after filing of the Petition, as prescribed by subdivision 3 of Rule 38 of this Court, nor at any time prior to August 12, 1940;

c. The Petition fails to set forth any of the facts required to appear as a basis for granting a Writ of Certiorari, as indicated or suggested by subdivision 5 of Rule 38 of this Court.

We respectfully direct the attention of the Court to the fact that we are not parties to, and have no interest in, Case No. 150 in which a Writ of Certiorari is also requested by Petitioner. Petitioner's Summary of Facts, Resume of Questions Involved, Statement of Reasons urged for granting the Writs and the Brief and Argument presented to this Court by Petitioner, combine and confuse Case No. 150, in which we have no interest with Case No. 151, in which we are Respondents, so as to make it appear that the two

cases are similar, if not identical, as to facts and issues.

Our Case No. 151 is a libel suit and should be considered as such and not otherwise.

I.

SUMMARY OF THE ALLEGATIONS OF AMENDED COMPLAINT.

(In the following summary, the Roman numerals refer to the corresponding numbered paragraphs of the Amended Complaint.)

The First Amended Complaint is entitled "FIRST AMENDED COMPLAINT: LIBEL".

The important allegations of the Amended Complaint, in so far as they affect the newspaper Respondents, are the following:

That plaintiff is a resident and citizen of California, City of Fresno, in the Southern District of California; that certain of the defendants are also California residents with California businesses. (I to IV) (R. 81-3.)

That certain public officers aided and abetted certain other defendants (not including the newspaper defendants) in furnishing the newspaper defendants with the stories published by said newspaper defendants. (VI) (R. 84-5.)

That certain defendants (not including the newspaper defendants) conspired to publish untrue stories

against plaintiff in order to acquire his property. (VIII) (R. 86-7.)

That defendants (not including the newspaper defendants) conspired to have published a story that plaintiff was guilty of grand theft and was guilty of and had committed violations of the Corporate Securities Act (a felony) (X and XI) (R. 89-91); in that defendants (not including the newspaper defendants) caused to be published in the defendant The Tribune Publishing Co.'s OAKLAND TRIBUNE, in defendant Hearst Publications, Inc.'s OAKLAND POST ENQUIRER, and in defendant The Chronicle Publishing Co.'s THE SAN FRANCISCO CHRONICLE, stories (set out in haec verba) in which it is stated that plaintiff was *arrested* on a warrant charging violations of the Corporate Securities Act, feared an invasion of his property by competitive oil companies, and that battles had occurred with regard to plaintiff's property. (XII, XXI, XV, XVIII) (R. 91-94; 109-113, 97-101, 103-106.)

That the newspaper stories to the effect that the plaintiff was arrested and was charged with a crime meant and were understood by people generally to mean that he was guilty of and had been convicted of a felony (XIII, XVI, XIX) (R. 94-96, 101-103, 106-108); that although plaintiff had been convicted before an Alameda County jury on a charge of violating the Corporate Securities Act and grand theft, had been sentenced to prison and had served a sentence therefor (last paragraph XXXI, XXXII) (R.

128-9), plaintiff was in fact innocent since he had acted in reliance upon an opinion of the Attorney General.

That as a result of the acts complained of, plaintiff's right of privacy has been violated by the alleged defamations and violations of this privacy to his damage in the sum of $37,500,000. (XXVIII) (R. 122-3.)

That prior to the first publications and alleged libels, plaintiff's reputation and standing was good. (XXIX) (R. 123-4.)

That he served a sentence upon his conviction of grand theft and violation of the Corporate Securities Act in the County Jail and State of California penitentiary from March 1, 1933 until May 13, 1937. (XXXII) (R. 129.)

That the damage to which plaintiff is entitled on account of defendants' alleged libels should be increased by reason of the alleged malice of defendants and acts of defendants in taking away and wrongfully appropriating plaintiff's property (last paragraph XXIV) (R. 118-9); that all of the acts complained of were for the "objects and purposes of defaming, libeling and discrediting plaintiff's reputation, public opinion and character". (First paragraph XXXIV) (R. 130-1.)

In his prayer, plaintiff prays for judgment of $37,500,000 and an additional $112,500,000 exemplary damages, or an aggregate of $150,000,000, and for costs.

In its essence then, the complaint is brought by a California citizen against California citizens and others, alleging that libels were committed by the publication of true statements that plaintiff was arrested and charged with criminal offenses (grand theft and violations of the Corporate Securities Act), despite the fact that it appears in the Complaint that he was convicted for said grand theft and for violations of the Corporate Securities Act.

We shall proceed to a discussion of the points involved as follows:

II.

THE DISTRICT COURT LACKED JURISDICTION: THERE WAS NO DIVERSITY OF CITIZENSHIP.

It is elementary that the facts upon which jurisdiction of the Federal Court rests must appear affirmatively in the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments.

Wolfe v. Hartford Ins. Co., 148 U. S. 389.

It is also elementary that for jurisdictional purposes the controversy is not between citizens of different states within the meaning of Judicial Code Section 24, unless all of the persons on one side of it are citizens of different states from all the persons on the other side.

Southern Pacific Co. v. Denton, 146 U. S. 202;
Perez v. Canadian Land & Fur. Co., 14 Fed. (2d) 181.

The record in this case fails to affirmatively show diversity of citizenship and the Court was, accordingly, compelled to dismiss this action for lack of jurisdiction.

III.

THE DISTRICT COURT LACKED JURISDICTION: NO FEDERAL QUESTION WAS INVOLVED.

In the District Court Petitioner did not claim that the suit was one arising under the Constitution or laws of the United States.

In his brief, however Petitioner argues that his complaint states a cause of action for violation of the Anti-Trust Laws of the United States. In support of such inference, he refers to paragraph XVIII and the end of paragraph XXIV. (R. 93-94, 103-104-105.) In paragraph XVIII, Petitioner does not allege any *facts* showing any violation of any Federal statute, but merely by way of *recital* refers to "Anti-Trust Laws of these United States". Petitioner's specific allegation is that defendants "also continuing their unlawful same scheming in violation of Anti-Trust Laws of these United States, same defendants agreeing and so planning to do * * * to thereby blacken, discredit, besmirch and libel this plaintiff did * * * cause to be published by defendant The Chronicle Co.'s 'San Francisco Chronicle' " a certain alleged libel.

In the first place, any allegation merely to the effect that a certain action is contrary to the Constitution

or Anti-Trust Laws is a mere conclusion of the pleader and must be disregarded.

See:

Sacramento and San Joaquin Drain. Dist. v. Superior Ct., 196 Cal. 414.

In the second place, matters of substance must be presented by direct averment and may not be stated in the form of recitals.

Stefani v. S. P. Co., 119 Cal. App. 69, 5 Pac. (2d) 946;

McClellan v. State, 119 Cal. App. 535, 6 Pac. (2d) 994, certiorari denied in 287 U. S. 611, 53 Supreme Ct. 14, 77 Law. Ed. 531;

Johnson v. Fletcher, 97 Cal. App. 153, 274 Pac. 1001;

and see

Swasey v. de L'Etanche, 17 Cal. App. (2d) 713, 62 Pac. 753.

It is elementary that the jurisdictional averments must be positive and not argumentative.

Hanford v. Davis, 163 U. S. 273, 16 Supreme Ct. 1051, 41 L. Ed. 157.

> "It is not enough that grounds of jurisdiction, other than diverse citizenship, may be inferred argumentatively from the statements in the bill for jurisdiction cannot rest on any ground that is *not affirmatively* and *positively* set forth."
>
> *Shulthis v. McDougal,* 225 U. S. 561, 569, 32 Supreme Ct. 704, 56 L. Ed. 1205.

Moreover, this mere recital that while defendants were continuing scheming in violation of Anti-Trust Laws they libeled plaintiff falls far short of fulfilling the jurisdictional requirement on the ground that a Federal question must appear by distinct, positive averments setting forth the cause of action according to the rules of good pleading.

Where references to a Federal Constitution or law are pleaded as emphasizing the defendant's wrongdoing, they do not import a Federal question in the case.

Martin v. Lankford, 245 U. S. 547, 62 L. Ed. 464.

Federal jurisdiction of a cause as presenting a Federal question is not supported by allegations in a complaint that are much too casual and meagre to give serious color to the claim that the action is one arising under the laws of the United States and where the contention is plainly an after-thought not in the mind of the author of the complaint.

Niles-Bement-Pond Co. v. Iron Molders Union, 254 U. S. 77, 65 L. Ed. 145.

According to the above rules, the mere recitals contained in paragraph XVIII, since they do not even comprise averments, are insufficient to satisfy the requirement that a Federal question can only arise under positive, nonargumentative and clear averments setting forth a cause of action according to the laws of good pleading.

A fortiori, the allegations at the end of paragraph XXIV (R. 103-4-5) do not specify the requirements that the facts averred must show distinctly that the suit arises under some Federal law by his allegations that further damage to plaintiff flowed from defendants' alleged libels through defendants' taking plaintiff's property at various times between 1932 and 1937. Obviously, such averments do not positively, nonargumentatively, affirmatively or distinctly set forth a Federal question by good pleading.

Obviously, this suit for defamation on the ground that defendants caused false statements to be made with regard to plaintiff's arrest is no more one under the Anti-Trust Laws than is a suit for defamation on the grounds that defendants made false statements that plaintiff's patents were an infringement is one arising under the patent laws.

> *American Well Works Co. v. Layne & Bowler Co.*, 241 U. S. 257, 36 Supreme Court 585, 60 L. Ed. 987.

None of the cases cited by plaintiff supports his inference that the First Amended Complaint sets forth a Federal question.

Since there are no presumptions in favor of the Courts of the United States and the jurisdiction of the United States Courts cannot be enlarged by improper pleading, we respectfully submit that Petitioner's Amended Complaint fails to set forth any allegation showing that Petitioner's alleged cause of action is one which involves a substantial Federal question. Since the amended complaint fails to set forth any

diversity of citizenship or any Federal question, the District Court lacked jurisdiction and, accordingly, was compelled to dismiss this action for lack of jurisdiction.

IV.

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION.

The gist of the complaint is that in accordance with a plan made with their co-defendants these Respondents published articles to the effect that plaintiff A. M. Gilstrap was "arrested * * * on a warrant charging him with violating the Corporate Securities Act and grand theft", that he feared rival oil companies would attempt to invade his property and that there have been armored battles with regard to this property.

Despite statements of the complaint that these publications were false and defamatory, it affirmatively appears from the complaint that Petitioner was not only arrested on a warrant charging him with violating the Corporate Securities Act and grand theft, but was convicted, both for violation of the Corporate Securities Act and for grand theft. It, accordingly, affirmatively appears from the complaint that the publications were privileged publications under the provisions of subdivisions 4 and 5, section 47 of the Civil Code of the State of California.

V.

THE PUBLICATIONS ARE NOT LIBELOUS PER SE AND CANNOT BE MADE SO BY INNUENDO.

It is obvious and has many times been held that a statement that a person *is charged* with a criminal offense is not the equivalent of stating that he is a criminal or is guilty. It is elementary "that an innuendo cannot read into a publication a meaning which it does not bear on its face".

Yankwich's Essays on the Law of Libel, pages 87 to 96 and page 43.

Stated otherwise:

> "The innuendo cannot ascribe a meaning to the defamatory matter other or broader than the words themselves naturally bear, when read in the light of the inducement. An innuendo helps nothing unless the words to which it applies have a violent presumption of the innuendo. An unwarranted attempt to extend defamatory meaning merely by innuendo will not save the cause of action; and an innuendo which violates this rule will be rejected as surplusage."

16 *Cal. Jur.* sec. 58, pages 89, 90, citing many cases.

Applying the above rules to the case at bar, the innuendo here must be rejected as surplusage, leaving the sting of the publication merely that Petitioner A. M. Gilstrap was charged with a violation of the Corporate Securities Act and grand theft.

The original complaint in this case was labeled by the Petitioner "Complaint for Libel Damages" (R. 4) and the First Amended Complaint is also labeled

"Libel". (R. 81.) The original and amended complaints bristle with allegations designed to impute evil motives to the defendants actuating them in publishing the alleged libels. However, the complaint must stand or fall so far as these Respondents are concerned according to whether or not the publications complained of were actually libelous and actionable as such. It is elementary that a publication which is not libelous does not become so because of the motives which suggested the publication.

VI.

PETITIONER'S CAUSE WAS BARRED BY THE STATUTE OF LIMITATIONS.

The complaint alleges that the publications complained of all occurred in October, 1932. This action was commenced November 3, 1938. The complaint alleges that the Petitioner was confined in the County Jail and the State Penitentiary from March 1, 1933 to May 13, 1937. On the face of the complaint it appears that he had five months before he was imprisoned and eighteen months after he left prison to commence this suit. This action is barred in one year. (Section 340, subdivision 3, California C. C. P.) Petitioner had twenty-three months when he was under no disability within which to commence the action and his undue delay bars this action. Section 352 California C. C. P., on which Petitioner relies does not avail him because his disability did not exist at the time his cause of action accrued.

VII.

THE OBJECTION TO VENUE IS VALID.

In addition to the foregoing it is to be observed that the action was brought in the wrong district and wrong division.

A careful examination of this complaint discloses that there is no allegation to the effect that the *plaintiff* or any of the defendants resided in or were inhabitants of the Southern District of California, Central Division.

> "These rules (new rules) shall not be construed to extend or limit the jurisdiction of the District Courts of the United States for the venue of actions therein (Rule 82)."

> "The rule is, under the present Act, that in personal suits founded on diversity of citizenship only, the defendant must be sued (a) in his own state, and in the division of the judicial district of which he is an inhabitant, or (b) in the state of plaintiff's residence, and in any division of the Federal District in which the plaintiff resides, if the defendant can be served there."
>
> *Simkins Federal Practice,* Third Edition, section 63, page 88, citing cases.

Applying these rules to the case at bar, it will be found that here (a) the Respondents were not sued in the Division of Judicial District in which they or any of their co-defendants were inhabitants, and (b) they were not sued in any division of the Federal District in which Petitioner resides. This case does not fall within any exceptions to the rule.

If a suit is brought against the defendant in the wrong Division of his District—in any Division other than that in which he resides—the objection is well taken and seasonably made and the Court has no power to transfer to the appropriate Division.

Simkins Federal Practice, Third Edition (1938), Section 79, pages 100-1.

It is respectfully submitted that the petition should be denied.

Dated, San Francisco, California,
August 30, 1940.

GROVE J. FINK,
Attorney for Respondent,
Hearst Publications, Incorporated.

ROBINSON, PRICE & MACDONALD,
Attorneys for Respondent,
The Tribune Publishing Company.

PERCY E. TOWNE,
Attorney for Respondent,
The Chronicle Publishing Company.

Office Supreme Court, U. S.
FILED
AUG 21 1940
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 150

A. M. GILSTRAP, et al.,
Petitioners,
vs.
STANDARD OIL COMPANY, an Ohio corporation, et al.

No. 151

A. M. GILSTRAP,
Petitioner,
vs.
STANDARD OIL COMPANY, an Ohio corporation, et al.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, STANDARD OIL COMPANY, AN OHIO CORPORATION, IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

FELIX T. SMITH,
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In the Supreme Court
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OCTOBER TERM, 1940

No. 150

A. M. GILSTRAP, et al.,
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No. 151

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BRIEF FOR RESPONDENT, STANDARD OIL COMPANY, AN OHIO CORPORATION, IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

OPINIONS BELOW.

The remarks of the judge of the district court concerning his rulings on the various motions (No. 150, R. 283; No. 151, R. 377) are unreported. Both cases were disposed

of by the circuit court of appeals in one opinion (No. 150, R. 329; No. 151, R. 446), which is reported in 108 F. (2d) 736.

JURISDICTION.

A petition for rehearing in each case was denied by the circuit court of appeals on March 13, 1940 (No. 150, R. 331; No. 151, R. 448). The petition for writs of certiorari was filed June 13, 1940. It was in typewritten form, accompanied only by an uncertified printed copy of the circuit court of appeals record in each case. On or about July 15, 1940, petitioners furnished one certified and nine additional copies of each record, containing the proceedings and opinion in the circuit court of appeals.

The petition for writs of certiorari cannot be deemed to have been timely filed.

Section 8(a), Act of February 13, 1925, 43 Stat. 936, 940 (U.S.C. 28:350);

Rule 38, Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE.

No. 150 is an action brought by petitioners in the United States District Court for the Southern District of California to recover $30,000,000 damages, together with "treble damages" and $275,000 attorneys' fees (R. 135, 167). Standard Oil Company, an Ohio corporation (hereinafter referred to as "Standard of Ohio"), two other corporations, and a number of individuals, were named as

defendants. Petitioners are citizens of California (R. 135). One of the corporate defendants[1] and all of the individual defendants whose citizenship is shown by the record,[2] are citizens of California.

No. 151 is an action brought by petitioner in the same court to recover $37,500,000 damages, together with "exemplary damages in Treble That Sum" (R. 81, 132). Standard of Ohio, five other corporations, and a number of individuals were named as defendants. Petitioner is a citizen of California (R. 82). Three of the corporate defendants are California corporations;[3] all of the individual defendants whose citizenship is shown by the record are citizens of California.[4]

Service in each case was made upon Standard of Ohio by delivering a copy of the summons to the Secretary of State of California (No. 150, R. 181; No. 151, R. 146).[5]

Standard of Ohio is a corporation organized and existing under the laws of Ohio; it has never qualified to do business in California; it has never designated the Secretary of State of California or any other person in Cali-

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[1]San Martinez Oil Company, R. 222.

[2]Warren, R. 118; Brandon, R. 122; Driver, R. 120; Tracy, R. 119; Perkins, R. 117; Pearce, R. 130.

[3]San Martinez Oil Company, R. 261; Hearst Publications, Incorporated, R. 81, 182; The Tribune Publishing Co., R. 81-82, 170.

[4]Warren, R. 192-193; Brandon, R. 192-193; Driver, R. 192-193; Tracy, R. 192-193; Berry, R. 194; Perkins, R. 191; Donahue, R. 288; Conniff, R. 267; Carr, R. 200; Van Patten, R. 273; Radbruch, R. 192-193; Garbini, R. 275.

[5]In each case, petitioners failed to deliver to the Secretary of State a statement of the address of Standard of Ohio, as required by the second paragraph of section 406a of the Civil Code of California, and the Secretary, therefore, did not forward a copy of either summons to Standard of Ohio (No. 150, R. 223-225, 277-279; No. 151, R. 258-259, 317-319).

fornia as its agent to receive service of process; it has never transacted business, or maintained an office or any other place of business, or performed services of any kind, in California; it has never owned or had any interest in property, including bank accounts, in California; it has never transported any goods, wares or merchandise within, or into or from, California; it has never executed or performed, or agreed to execute or perform, any contract in California; it has never had an officer, agent, employee, representative, subsidiary, partner or associate, authorized by it to contract, or to conduct business, for or on its behalf, located or residing in California; it has never owned any stock or other interest in a corporation, association, copartnership or business of any kind located, or doing or authorized to do business, in California.[6]

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[6]**No. 150**: Certificate of Frank C. Jordan, Secretary of State of California (R. 225-226); affidavit of Robert V. Jordan, Assistant Secretary of State of California (R. 223-225); affidavit of W. T. Holliday, president of Standard of Ohio (R. 190-199); affidavit of W. J. Semple, vice president and treasurer of Standard of Ohio (R. 200-209); affidavit of F. H. Kelly, secretary of Standard of Ohio (R. 210-219); affidavit of Glen M. Foster, assistant secretary of Standard Oil Company of California (R. 221); affidavit of W. N. Brower, secretary of San Martinez Oil Company (R. 222-223).

No. 151: Certificate of Honorable Frank C. Jordan, Secretary of State of California (R. 262-263); affidavit of Honorable Robert V. Jordan, Assistant Secretary of State of California (R. 258-259); affidavit of W. T. Holliday, president of Standard of Ohio (R. 207-224); affidavit of O. L. Brown, assistant treasurer of Standard of Ohio (R. 224-240); affidavit of F. H. Kelly, secretary of Standard of Ohio (R. 241-257); affidavit of Glen M. Foster, assistant secretary of Standard Oil Company of California (R. 259-260); affidavit of W. N. Brower, secretary of San Martinez Oil Company (R. 261-262); affidavit of Norbert Korte, Esq. (R. 290-298); supplemental affidavits of Messrs. Felix T. Smith, Renato Capocelli, W. F. Hillman, Glen M. Foster and Norbert Korte (R. 331-371).

In each case, Standard of Ohio appeared specially and moved to quash the return of the service of summons upon it and to dismiss the action, on the grounds, among others, that it had not been served with summons and that it was not subject to suit in the Southern District of California (No. 150, R. 188; No. 151, R. 205). The motions were supported by the affidavits referred to above.[7]

The district court granted the motions and dismissed the actions (No. 150, R. 285, 286-287; No. 151, R. 382, 387-388). The circuit court of appeals affirmed (No. 150, R. 330; No. 151, R. 447).

ARGUMENT.

The district court correctly granted the motions of Standard of Ohio to quash service and dismiss the actions. If it be assumed that the amended complaints state causes of action under the antitrust laws—as petitioners apparently contend—the court was without jurisdiction as to Standard of Ohio because that company is not an inhabitant of, nor may it be found in, nor does it transact business in, the Southern District of California.[8]

Act of October 15, 1914, c. 323, sec. 12, 38 Stat. 730, 736 (Clayton Act, U.S.C. 15:22);[9]

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[7]Footnote 6, supra.

[8]See pages 3-4, supra.

[9]Sec. 12 of the Clayton Act provides:

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

Eastman Co. v. Southern Photo Co. (1927) 273 U.S. 359, 370-374;

Hansen Packing Co. v. Armour & Co. (S.D. N.Y., 1936) 16 F. Supp. 784, 786-787.

If, on the other hand, it be assumed that no cause of action under the antitrust laws is stated—as obviously is the case—then, since diversity of citizenship is lacking, the district court was without jurisdiction as to Standard of Ohio under section 51a of the Judicial Code (U.S.C. 28:112).[10]

CONCLUSION.

It is respectfully submitted that the petition for writs of certiorari should be denied.

Dated, San Francisco, California,
August 16, 1940.

FELIX T. SMITH,
NORBERT KORTE,
FRANCIS R. KIRKHAM,
Attorneys for Respondent,
Standard Oil Company,
an Ohio corporation.

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[10]Sec. 51a of the Judicial Code, so far as pertinent, provides: "(a) • • • no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; • • •."

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SEP 9 1940
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.
No. 151

A. M. GILSTRAP,

Petitioner,

vs.

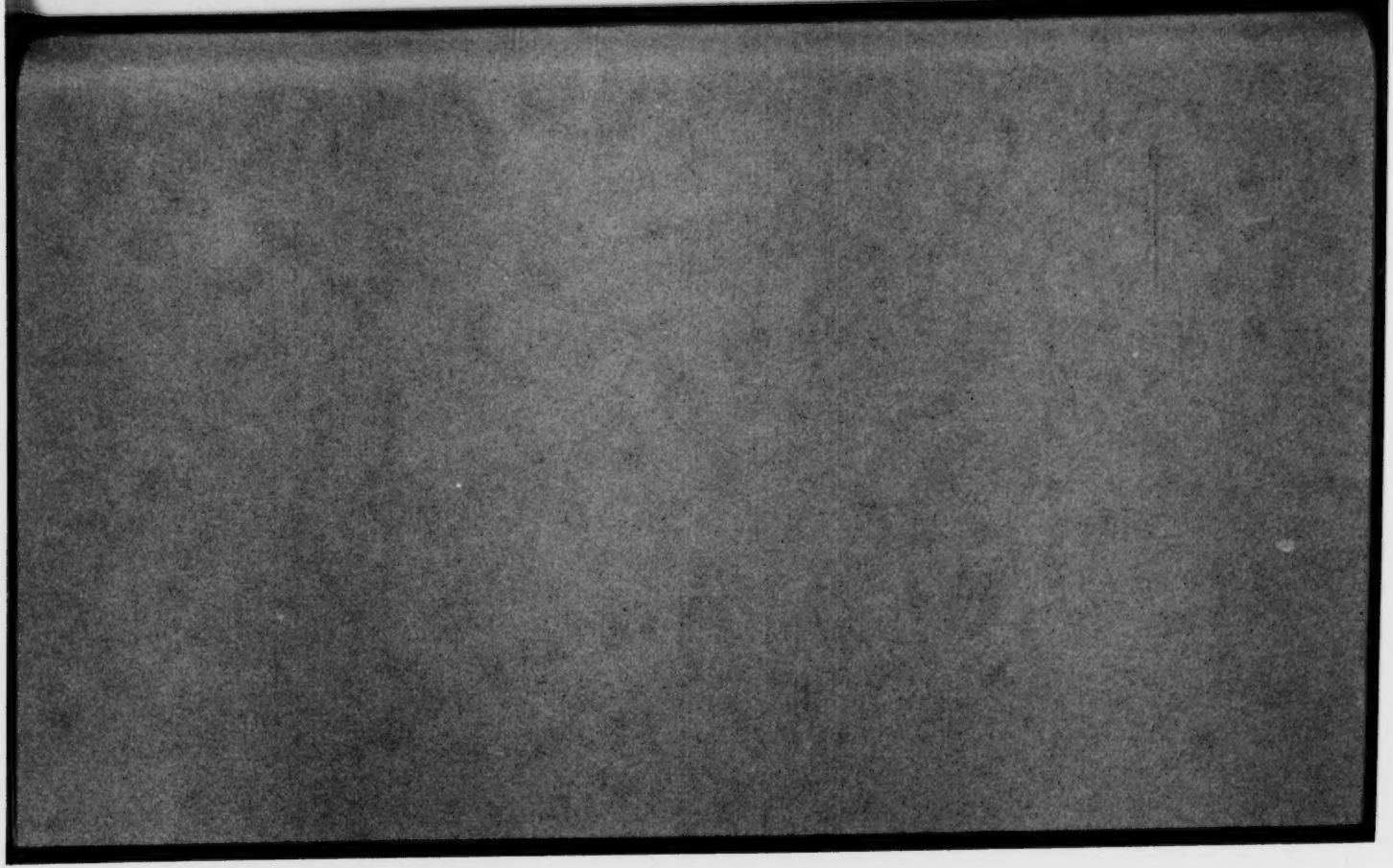
STANDARD OIL COMPANY, a corporation, *et al.*,

Respondents.

Brief of Respondent Standard Oil Company of California in Opposition to Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.
No. 151

A. M. GILSTRAP,

Petitioner,

vs.

STANDARD OIL COMPANY, a corporation, *et al.*,

Respondents.

Brief of Respondent Standard Oil Company of California in Opposition to Petition for Writ of Certiorari.

Opinions Below.

The opinion of the Circuit Court of Appeals [R. 446] is reported in 108 Fed. (2d) 736. Though no formal opinion was rendered by the District Court, the remarks of that court at the time of its ruling may be found at R. 377-387.

Jurisdictional Statement.

The petition for a writ of certiorari was filed on June 13, 1940, the last day of the three months' period following the denial of the petition for rehearing by the Circuit Court of Appeals [R. 448]. A certified copy of the record was not filed until on or about July 15, 1940. The petition therefore cannot be deemed to have been timely filed (sec. 8(a), Act of February 13, 1925, 43 Stat. 936, 940 (U. S. C. 28:350), Rule 38, Rules of the Supreme Court of the United States).

Statement of the Case.

This action was commenced November 3, 1938 [R. 45], in the United States District Court for the Southern District of California, Central Division, by petitioner, a citizen and resident of California [R. 82]. The defendants named in the complaint include Hearst Publications Incorporated and Tribune Publishing Company, both California corporations [R. 81], and a number of individuals whose citizenship is not alleged, but who are shown, by affidavits in the record, to be citizens of California [R. 193, 200, 267, 273, 275, 287-288].

The original complaint, entitled "Complaint for Libel Damages" [R. 4], was, after a hearing, supplanted by a "First Amended Complaint: (Libel)" [R. 81]. Respondent filed an answer to this complaint, setting up, as affirmative defenses, lack of jurisdiction and failure to state a claim upon which relief could be granted [R. 277-278]. Pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, these affirmative defenses were brought on for hearing prior to trial, and were sustained. Judgement dismissing the action was accordingly entered [R. 397].[1] Upon appeal, the Circuit Court of Appeals affirmed the judgment [R. 447], and denied a petition for rehearing [R. 448].

The complaint seeks recovery of $37,500,000.00 plus exemplary damages in treble that amount [R. 132]. The

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[1]Motions to dismiss filed by other respondents were heard and granted at the same time, and judgments of dismissal entered [R. 387, 389, 390, 392, 396, 398, 400].

facts upon which petitioner relies are obscure and are not stated in his petition. Examination of the complaint, however, reveals allegation of the following:

1. That at all times mentioned in the complaint, except during his "Disability," plaintiff "leased, bought, explored, discovered, drilled for and obtained" oil and gas "in and from mineral-bearing lands" in Yolo and Alameda Counties in California, and had discovered large quantities of oil and gas in 40,000 acres of land in Yolo County and in 2,743 acres of land in Alameda County [R. 82-83].

2. In October, 1932, and while plaintiff was drilling for oil on lands owned and on lands leased by him, four newspaper articles of alleged libelous character were published by respondents Hearst Publications Incorporated, Chronicle Publishing Company, and Tribune Publishing Company. These articles described the arrest of plaintiff on a warrant charging violation of the California Corporate Securities Act and grand theft [R. 91, 97, 104, 109]. The newspaper articles also related Gilstrap's contentions that the warrant was a result of a frameup [R. 98]; that he was innocent of the charges on which he was arrested [R. 106]; that he had pending a ten million dollar lawsuit against Standard Oil Company on a claim that he was defrauded out of oil lands in Yolo County [R. 106, 112]; and that it was necessary to maintain guards [R. 93] because hirelings of rival oil companies had invaded his property and threatened to kidnap his son [R. 110-111]. It is further alleged [R. 115] "That owners and lessors of said lands . . . read and believed . . . all said publications to be true, and thereupon cancelled and were caused to

cancel each and every of said leases and leaseholds . . ."

3. Petitioner was arrested at the time, and upon the charges described in the so-called libelous publications [R. 89, 129]. Thereafter a trial was had, and though the charge is alleged to have been illegal, petitioner was convicted of violation of the Corporate Securities Act and served a term in the California State Penitentiary [R. 129].

4. In October, 1932; October, 1936; January, 1937; May, 1937; and September, 1937, all of the defendants are alleged, on information and belief, to have broken into petitioner's home and to have stolen certain documents, papers and personal effects [R. 116-118].

It is also alleged in the form of a conclusion of the pleader, and upon information and belief, that the acts of defendants resulted from a combination and conspiracy to acquire certain land and certain oil leases of plaintiff [R. 86], and that "said defendants did carry out and accomplish aforesaid plan, scheme and conspiracy thereby, as was so agreed and made by them" [R. 115]. Except for these conclusions nothing is stated as to how or when the conspiracy was formed or as to how or when its purpose was accomplished. If plaintiff meant to allege that defendants acquired his "leases and leaseholds" after their cancellation, it is assumed that he would have alleged how they were acquired, when they were acquired, and whether or not the drilling or other obligations thereof were performed by defendants. Apparently a portion of the land in question was owned by plaintiff [R. 91] rather than leased by him. How or when, if at all, defendants acquired this land is not alleged.

It is impossible to determine from petitioner's complaint, the theory upon which the action was brought. Though denominated a "First Amended Complaint: (Libel)" [R. 81], petitioner's pleading contains in addition to allegations pertaining to a libel action reference to malicious prosecution, trespass, and conversion of personal property. Though mention is made of the antitrust laws, no allegation showing a restraint upon interstate commerce can be found.

Argument.

As is noted above, plaintiff and a number of the defendants are citizens of California. Hence, no diverse citizenship exists. Accordingly, unless a Federal question is presented, the District Court had no jurisdiction.

Petitioner apparently contends that the case is one arising under the antitrust laws (Pet. p. 5). The complaint contains petitioner's conclusion that the acts alleged therein are violative of the antitrust laws, but the mere conclusion of the pleader is not, of course, sufficient to support a claim for relief. The complaint fails to allege any facts which show that a restraint of interstate commerce occurred or that petitioner suffered any damage by reason of the alleged acts of respondents. Petitioner's alleged loss of his "lands" is entirely unexplained. His "leases and leaseholds" are alleged to have been lost by the lessor's cancellation. If such cancellation occurred, it must have been based upon a default by petitioner thereunder and was proximately caused by such default rather than by any act of defendants. It is not even intimated that this default had any connection with defendants' acts. If such cancellation resulted from petitioner's arrest upon a criminal charge, his damage proximately resulted

from his own violation of the law. Obviously, no one can be required to respond in damages for causing the arrest of another when a conviction results. (See *Crescent Live Stock Co. v. Butchers' Union* (1886), 120 U. S. 141, 159; *Carpenter v. Nutter* (1899), 127 Cal. 61.) It is therefore clear that petitioner has not been damaged by anything proximately traceable to respondents. If, as was apparently intended at the outset, petitioner sought damages for libel, he failed to state a cause of action, because it is apparent from the complaint that the newspaper articles stated the truth. Moreover, such a cause of action would not be within the jurisdiction of the federal court.

Conclusion.

It is respectfully submitted that the trial court lacked jurisdiction of the action and that no claim upon which relief could be granted is stated in the complaint. The petition for a writ of certiorari is without merit and should be denied.

Dated: At Los Angeles, California, September 5, 1940.

OSCAR LAWLER,
MAX FELIX,
JOHN M. HALL,
MARCUS MATTSON,

Attorneys for Respondent, Standard Oil Company of California, a Delaware Corporation.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940
No. 150.

A. M. GILSTRAP, *et al.*,

Petitioners,

vs.

STANDARD OIL COMPANY, a corporation, *et al.*,

Respondents.

Brief of Respondent Standard Oil Company of California in Opposition to Petition for Writ of Certiorari.

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IN THE

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A. M. GILSTRAP, *et al.*,

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STANDARD OIL COMPANY, a corporation, *et al.*,

Respondents.

Brief for Respondent Standard Oil Company of California in Opposition to Petition for Writ of Certiorari.

Opinions Below.

The opinion of the Circuit Court of Appeals [R. 329] is reported in 108 Fed. (2d) 736. No formal opinion was rendered by the District Court. The remarks of the court at the time of the last hearing may be found at R. 283-286.

Jurisdictional Statement.

The petition for a writ of certiorari was filed on June 13, 1940. This was the last day of the three months' period following the denial of the petition for rehearing by the Circuit Court of Appeals [R. 331]. A certified copy of the record was not filed until on or about July 15, 1940. The petition therefore cannot be deemed to have been timely filed (sec. 8 (a), Act of Feb. 13, 1925, 43 Stat. 936, 940 (U. S. C. 28:350); Rule 38, Rules of the Supreme Court of the United States).

Statement of the Case.

This action was brought by petitioners in the United States District Court for the Southern District of California, Northern Division, against this respondent and numerous other defendants. The court sustained a demurrer to the first amended complaint, with leave to amend [R. 131-134]. Upon the filing of the second amended complaint, this respondent filed a motion to dismiss, upon the grounds that the complaint failed to state a claim upon which relief could be granted, that the court lacked jurisdiction, and that the cause of action, if any, was barred by the statute of limitations[1] [R. 246-250]. The court granted the motion and entered a judgment dismissing the action [R. 288-289]. Upon appeal, the Circuit Court of Appeals affirmed the judgment [R. 330] and denied a petition for rehearing [R. 331].

The second amended complaint alleged that petitioners "reside" in Fresno County, California, and that one of the other respondents, Standard Oil Company, was incorporated under the laws of the State of Ohio [R. 135]. There is no other allegation as to citizenship or residence of the parties.

It is quite impossible to determine with any clarity the facts upon which petitioners rely. However, allegation of the following is found in the second amended complaint [R. 135-179]:

> During 1919 "and thereafter" A. M. Gilstrap purchased 400 acres and leased 40,000 acres of land in Yolo County, California [R. 138], and engaged in

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[1]Similar motions were filed by other respondents [R. 183, 188, 233, 234].

"much exploration, drilling and locating" of oil and gas "in and beneath the same" [R. 138].[2] In 1924 he entered into a contract with defendant oil companies and the Browers whereunder the oil companies and the Browers agreed to commence drilling a well on those lands within ninety days and to drill thirty wells over a period of more than twenty years [R. 139], and whereunder Gilstrap was to be furnished with records and information concerning operations [R. 140], and was to receive one/twenty-fourth of the oil produced "or of the proceeds thereof" [R. 147]. Drilling was commenced within the ninety days, and (upon information and belief) oil was discovered [R. 141]. Upon "discovery and proof as aforesaid . . . said plaintiff during said times did and since has negotiated and agreed with the owners of other portions of said lands and leaseholds, and with other persons, firms and corporations, that he would drill or cause to be drilled in said County a great many other wells . . ." [R. 148-149]. Defendants, however, falsely reported that oil was not discovered by them [R. 149-150], and "in and during the years 1926-1937" removed their equipment and obtained from the owners of "a large number" of Gilstrap's leaseholds, long-term leases of the oil and gas and drilling rights, and drilled and produced oil thereunder [R. 149-150].

If thirty wells had been drilled and the agreement otherwise performed, plaintiffs would have profited

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[2]At an undetermined date "an interest in the plaintiffs' said business and properties of the value of about $50,000," was owned by petitioner Vera G. White [R. 163]. The complaint does not disclose that petitioner Cora D. Gilstrap had or has any interest in the property or in this action.

to the extent of $30,000,000 [R. 144]; and the prayer is for this amount plus treble damages and attorneys' fees [R. 167].

During "the years 1930-1932 . . . plaintiff A. M. Gilstrap . . . demanded of said defendants that they then terminate their said unlawful acts, and that they partially reimburse him for his large expenses and cost . . . of said leaseholds so caused and taken by the defendants . . ." Upon the failure and refusal so to do [R. 151], Gilstrap in 1930 [R. 158] commenced an action in the San Francisco Superior Court for damages suffered by him by the "breach of contract and taking of said leaseholds" [R. 152].

In October, 1932, Gilstrap was arrested and charged with violation of the California Corporate Securities Act, and (although it is alleged that the charge was unlawful [R. 159-163]), was tried and convicted, confined in the penitentiary for twenty-five months, and thereafter released on parole [R. 158]. While he was imprisoned defendants caused the above action in the state court to be dismissed [R. 159]. On several occasions defendants broke into plaintiff's dwelling house and took numerous records, papers, reports, logs, analyses, samples, maps, diagrams, letters and contracts [R. 153-155].

To the foregoing, plaintiffs added allegations on information and belief and in the form of conclusions of the pleader that all of the acts of defendants were forbidden by the antitrust laws of the United States [R. 153, 156].

ARGUMENT.

I.

No Federal Question Is Presented.

Diversity of citizenship is not shown by the complaint. Accordingly, unless federal jurisdiction can be supported upon other grounds, no jurisdiction exists. Petitioners apparently contend that jurisdiction can be based upon the "anti-trust laws of the United States" (see petition, pp. 5-6). The mere conclusion of the pleader that the acts were violative of the antitrust laws is, of course, insufficient to support a claim for relief, and the complaint fails to allege any facts which show that a restraint of interstate commerce occurred or that petitioners suffered any damage by reason of the alleged acts of respondents.

In stating Gilstrap's property rights the complaint refers to (1) oil leases obtained by him on 40,000 acres of land during "1919 and thereafter", (2) 400 acres of land purchased by him during "1919 and thereafter", (3) his contract right to receive one/twenty-fourth of the oil produced by defendants or the proceeds thereof, and (4) drilling rights obtained by him, upon the alleged discovery of oil by respondents, from "owners of other portions of said lands and leaseholds" and from "other persons, firms and corporations." So far as the complaint shows, Gilstrap still owns all of these rights. It is not alleged that the oil leases on 40,000 acres of land have been can-

celled or surrendered. It is not alleged that he has conveyed away the 400 acres of land owned by him. It is not alleged that he has lost the one/twenty-fourth interest in production, or that he has not received said fractional portion of the proceeds thereof. There is no allegation that he has lost the oil leases which he obtained after respondents' alleged "discovery and proof."

The allegations of the complaint concerning Gilstrap's conviction of a felony and confinement in prison cannot, of course, support a prayer for damages. Even though maliciously instituted, a criminal prosecution cannot be the basis for legal action where a conviction results.

Crescent Live Stock Co. v. Butchers Union (1886), 120 U. S. 141, 159;

Carpenter v. Nutter (1899), 127 Cal. 61.

II.

The Action Is Barred by the Statute of Limitations.

The original complaint was filed September 18, 1937.[3] If, as petitioners argue, the action is one arising under the antitrust laws, the applicable statute of limitations is California Code of Civil Procedure, section 338, subdivision 1 (*Foster & Kleiser Co. v. Special Site Sign Co.* (9th C. C. A., 1936), 85 Fed. (2d) 742 (cert. denied, 299 U. S. 613)). This section provides that "an action upon a liability created by statute, other than a penalty or forfeiture," must be brought within three years.

In the first amended complaint petitioners alleged that on November 10, 1930, Gilstrap filed an action in the San Francisco Superior Court against this respondent and others "wherein said plaintiff alleged and set forth the foregoing allegations of ownership, and damage as hereinafter more particularly alleged" [R. 8-9]. After the demurrer to this complaint was sustained, petitioners, in the second amended complaint, sought to avoid the effect of the former allegation, and changed the reference to the San Francisco Superior Court action to an allegation that a portion of the damages was therein sought [R. 158]. It is clear, however, from the other allegations of the second amended complaint that all of the claimed damages were suffered more than three years before the filing of this action. It is alleged that "during the years

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[3]The record does not contain the original complaint or show the date of its filing. The statement in the petition (p. 3) that it was filed September 18, 1937, is, however, correct.

1930-1932" Gilstrap sought and demanded that defendants pay him damages for "said leaseholds so caused and taken by the defendants" but that defendants "failed and refused" to do so [R. 151]. The trial court was correct in concluding from the foregoing that petitioners could not state a cause of action which is not barred by the statute of limitations [R. 286].

As the purported cause of action accrued prior to Gilstrap's imprisonment, petitioners are not entitled to rely upon such imprisonment as a disability. A disability does not prevent the running of the statute of limitations unless the disability is in existence at the time the cause of action accrued.

Harris v. McGovern (1878), 99 U. S. 161, 167;
Williams v. Long (1900), 130 Cal. 58, 59.

Conclusion.

It is respectfully submitted that the trial court lacked jurisdiction of the action, that no claim upon which relief could be granted is stated in the complaint, and that the cause of action, if any, was barred by the statute of limitations. The petition for a writ of certiorari is without merit and should be denied.

Dated at Los Angeles, California, September 5, 1940.

OSCAR LAWLER,
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JOHN M. HALL,
MARCUS MATTSON,

Attorneys for Respondent, Standard Oil Company of California, a Delaware Corporation.



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FILED
SEP 11 1940
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CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 150

A. M. GILSTRAP, ET AL.,
Petitioners,
vs.
STANDARD OIL COMPANY, an Ohio corporation, et al.

No. 151

A. M. GILSTRAP,
Petitioner,
vs.
STANDARD OIL COMPANY, an Ohio corporation, et al.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF DEFENDANTS EARL WARREN, JOE BRANDON, M. B. DRIVER, GEORGE C. PERKINS, ROBT. P. TRACY, SAMUEL BERRY, L. E. VAN PATTEN, HUGO RADBRUCH, AND MARK W. GARBINI, IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 150

A. M. GILSTRAP, ET AL.,
Petitioners,
vs.
STANDARD OIL COMPANY, an Ohio corporation, et al.

No. 151

A. M. GILSTRAP,
Petitioner,
vs.
STANDARD OIL COMPANY, an Ohio corporation, et al.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF DEFENDANTS EARL WARREN, JOE BRANDON, M. B. DRIVER, GEORGE C. PERKINS, ROBT. P. TRACY, SAMUEL BERRY, L. E. VAN PATTEN, HUGO RADBRUCH, AND MARK W. GARBINI, IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

PRELIMINARY STATEMENT.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, disposing of both these cases, is reported in 108 F. (2nd) 736. No opinion was written in the District Court, but the rulings on the several motions and the remarks of the District Judge thereupon appear in the record (No. 150, 131-4 and 283-6; No. 151, 377-387).

STATEMENT OF THE CASE.

Petitioners commenced these actions in the United States District Court for the Southern District of California. Of the defendants filing this brief, Earl Warren, Joe Brandon, M. B. Driver, George C. Perkins and Robt. P. Tracy were named defendants in a first amended complaint in No. 150 (R. 3); and in No. 151 the same defendants, together with the balance of those here appearing, viz. Samuel Berry, L. E. Van Patten, Hugo Radbruch and Mark W. Garbini, were named defendants in a first amended complaint (R. 81). Several oil companies and other individuals were joined as defendants in each case, and in No. 151, the so-called "libel case," three newspaper companies were likewise joined.

Exception was taken on the part of these defendants to the jurisdiction of the District Court.[1] Affidavits were filed in support of their several motions, alleging the residence and citizenship of each of the defendants so appearing to be in the County of Alameda, State of California, and outside the District wherein the suit was brought. The affidavits so filed further show that each of these nine defendants were at the times referred to in petitioners' pleadings public officers of either the City of Oakland or the County of Alameda engaged in law

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[1]In No. 150, motion to dismiss of Brandon, Driver, Perkins and Tracy (R. 115), and demurrer under the former practice (R. 105); motion to dismiss of Warren (R. 320). Affidavits of each defendant in support of the motion (R. 117-123, 323).

In No. 151, motion to dismiss of Warren, Brandon, Driver, Tracy, Berry, Perkins, and Radbruch (R. 188-195). Motion to dismiss of Van Patten and Garbini (R. 269-277). Affidavits in support of these motions (R. 191, 273 and 275).

enforcement work.[2] In No. 151 the affidavits further state that as to each of these nine defendants that the only connection they ever had with petitioner Gilstrap was upon official business in connection with a criminal prosecution of said petitioners in Alameda County in 1932-1933.[3]

The grounds upon which dismissal was requested in the District Court were stated in the several motions (No. 150, R. 115 and 320; No. 151, R. 188 and 269), and are based upon lack of diversity of citizenship and failure to show the existence of a controversy arising under the Constitution or laws of the United States.

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[2]The data given in these affidavits is as follows:

NAME	OFFICIAL CAPACITY	PERIOD OF SERVICE
Earl Warren,	District Attorney, Alameda County,	January, 1925-January, 1939.
Joe Brandon,	Deputy Sheriff, Alameda County, and Inspector in office of District Attorney,	June, 1932-May, 1935.
M. B. Driver,	Sheriff, Alameda County,	Approximately 8 years last past.
Robt. P. Tracy,	Police Officer, City of Oakland,	More than 22 years last past.
Samuel Berry,	Deputy District Attorney, Alameda County,	Approximately April, 1931-August, 1933.
Hugo Radbruch,	Deputy Sheriff, Alameda County,	Approximately 11 years last past.
George C. Perkins,	Deputy District Attorney, Alameda County,	More than 10 years last past.
L. E. Van Patten,	Deputy Sheriff, Alameda County,	More than 12 years last past.
Mark W. Garbini,	Constable and ex-officio Deputy Sheriff, Alameda County,	More than 8 years last past.

[3]No. 151, R. 191, 194-5, 273-7.

The District Court granted the motions in each instance (No. 150, R. 131, 134; No. 151, R. 371, 375-6). In No. 150, demurrers were likewise sustained without leave to amend as to these defendants (R. 134). Thereafter a second amended complaint (R. 135) was filed in No. 150 omitting these defendants in conformity with the order, and none of the defendants here appearing were ever served therewith or thereafter appeared in No. 150. In No. 151, the motions to dismiss were granted without leave to amend (R. 375-6).

ARGUMENT.

Case No. 150.

Either diversity of citizenship or a cause of action arising under the Constitution or laws of the United States must be found to support the jurisdiction of the District Court in these cases,[4] else no jurisdiction existed and the District Court was correct in dismissing and the Circuit Court of Appeals was correct in affirming the dismissal.[5]

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[4]Original jurisdiction of District Courts is governed by Sec. 24 of the Judicial Code (Title 28 U. S. C. A. Sec. 41), the pertinent portion of which reads:

> "First. Of all suits of a civil nature, at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution of laws of the United States, . . . or (b) is between citizens of different states, . . ."

[5]Sec. 37 of the Judicial Code (Title 28 U. S. C. A. Sec. 80) requires dismissal where lack of jurisdiction appears. It is there provided:

> "If in any suit commenced in a district court, . . . it shall appear to the satisfaction of the district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or . . ., the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The record in each case affirmatively establishes lack of diversity of citizenship. The first amended complaint in each case established that each plaintiff was a resident and citizen of California (No. 150, R. 4; No. 151, R. 82). Each of the individual defendants likewise were citizens and residents of California (No. 150, R. 117-123, 323; No. 151, R. 191-194 and 273-277). It is elementary that for jurisdictional purposes the controversy is not between citizens of different states unless all the persons on one side are citizens of different states from all those on the other side.

Salem Trust Co. vs. *Manufacturers Finance Co.*, 264 U. S. 182, 189.

Ayres v. *Wiswall*, 112 U. S. 187, 192.

Gilbert vs. *David*, 235 U. S. 561, 567.

Perez v. *Canadian Land & Fur Co.*, 14 Fed. (2nd) 181, 183.

In No. 150 damages are claimed to have been suffered by plaintiffs as the result of the loss of certain leaseholds and the anticipated profits therefrom as the result of an asserted conspiracy on behalf of the corporate and the individual defendants. Plaintiffs claim they were deprived of their leasehold interests by the fraudulent abandoning of drilling operations on the part of certain of the defendants other than those in whose behalf this brief is written. All this occurred prior to November, 1930, that being the time plaintiff A. M. Gilstrap filed an action in the state court for the asserted fraud (No. 150, R. 8-9). It appears that no petroleum, natural gas or other hydro-carbon substance was ever produced from the lands in question (R. 37-41). That is to say, there was never any existing business which was destroyed, the

most that is claimed by plaintiffs being that a potential business was prevented from being developed.

The acts attributed to these particular defendants relate to their prosecution of plaintiff A. M. Gilstrap, which resulted in his conviction in a state court and his consequent incarceration in state's prison. All of this occurred in the latter part of 1932 and the early part of 1933 (R. 15-23). This was long after plaintiffs had lost their leases, which occurred some time prior to November, 1930.

Whatever injury plaintiffs may have suffered was complete long prior to the prosecution and conviction of A. M. Gilstrap. If they lost their properties as a result of a conspiracy they were lost long before the time any of these named defendants are charged with participation therein.

The gist of the action is not the conspiracy, for a conspiracy of itself is not civilly actionable; the right of recovery is based upon injuries that result therefrom, and no cause of action arises unless and until damages are sustained.

Nalle v. *Oyster*, 230 U. S. 165, 182.
Dowdell v. *Carpy*, 129 Cal. 168, 61 Pac. 948.

If the pleading in the case can be construed as alleging malicious prosecution or false arrest against these defendants the District Court would be without jurisdiction thereof. Furthermore, an action for malicious prosecution could not be sustained because of the absence of the vital factor of a conclusion of the prosecution favorable to the person prosecuted.

Crescent Live Stock Co. vs. *Butchers' Union*, 120 U. S. 141, 147-8.

Roos vs. *Harris*, 203 Cal. 201, 263 Pac. 225.

A public officer is not liable civilly for any action done by him in an official judicial or quasi judicial capacity.

Bradley vs. *Fisher*, 80 U. S. 335, 337.

Spaulding vs. *Vilas*, 161 U. S. 483, 498.

Cooper vs. *O'Connor*, (1938 App. D. C.) 99 Fed. (2nd) 135.

Pearson vs. *Reed*, 6 Cal. App. (2nd) 277, 44 Pac. (2nd) 592.

White vs. *Brinkman*, 23 Cal. App. (2nd) 307, 73 Pac. (2nd) 254.

Case No. 151.

Most of the foregoing is also applicable to the pleading in No. 151, which is denominated "Libel" (R. 81), and which recounts a good many of the same events referred to in No. 150. Damages in No. 151 are demanded apparently upon the theory that all defendants conspired together to publish false and malicious statements in newspapers and before a court and jury of and concerning plaintiff, whereby plaintiff was accused and convicted of crime, lost his credit with merchants, lost his leasehold interests in prospective oil lands, was prevented from making profits from the latter and was deprived of many records, papers and personal effects relating thereto.

The pleading fails to disclose any basis for Federal jurisdiction over the acts of state officers in prosecuting

and securing the conviction of plaintiff. It would seem that the judgment of conviction would constitute a complete answer to the charge of false accusations.

Nalle vs. *Oyster*, 230 U. S. 165, 182.

As stated by the District Judge in dismissing the action (R. 79):

> "There is nothing in the fifty volumes of the United States Code Annotated which gives the court original jurisdiction of an action for libel against a citizen of a state. Actions for libel may therefore be brought in a United States Court upon the other ground only, namely, that diversity of citizenship exists."

It is respectfully submitted that the petition for certiorari in each case should be denied.

Dated: September 4, 1940.

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